165-365

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~781~~. 436 156

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO EX REL. RUSSELL C. HUMPHREY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED AUGUST 13, 1894.

(15,665.)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Assignment of errors	*a*	1
Writ of error	*e*	3
Return to writ of error	*g*	4
Citation and service	*h*	4
Supersedeas bond	*i*	5
Transcript of docket and journal entries	*l*	6
Petition in error	1	8
Transcript from circuit court of the eighth judicial district	4	9
Petition	4	9
Præcipe for summons	8	11
Motion to make petition more definite	9	12
Demurrer to petition	11	13
Answer	13	13
Reply	16	15
Motion to strike out reply	18	15
Demurrer to reply	20	16
Transcript of docket and journal entries	21	17
Findings of fact	22	17
Conclusions of law	24	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 30, 1894.

	Original.	Print.
Judgment	24	18
Clerk's certificate	25	18
Bill of exceptions	26	18
Testimony of N. J. Strong	26	19
John Kulmane	39	28
Wm. H. Tallman	47	33
C. W. Guy	54	39
John Stearns	58	42
E. J. Willie	62	45
John Castle	66	48
A. S. Bowker	78	57
Capt. Perry White	86	63
Transcript from collector of customs office	92	67
Testimony of H. L. Morrison	93	68
R. C. Humphrey	101	74
H. P. Hepburn	112	82
H. G. Taylor	113	83
R. O. Rote, Jr	137	101
Findings of fact and conclusions of law	140	103
Judgment	142	104
Judge's certificate to bill of exceptions	142	104
Clerk's certificate	143	104
Petiton for writ of error	144	105
Order allowing writ of error, &c	146	106
Record entries	147	107
Judgment	147	107
Certificate of Federal question	148	107
Clerk's certificate	149	108

a In Supreme Court of United States.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Defendant in Error.
} Assignment of Errors.

Now comes the said The Lake Shore and Michigan Southern Railway Company, plaintiff in error, and for an assignment of errors herein says that on the 24th day of May, 1892, the defendant in error filed in the circuit court of the eighth judicial district, Cuyahoga county, State of Ohio, his certain petition charging and alleging that said plaintiff in error had constructed and for more than fifteen years last past had maintained and operated a bridge for the passage of its freight trains across the Ashtabula river, in said State, about one mile from the mouth of said river where the same empties into Lake Erie; that said river from its mouth to a point a considerable distance above said bridge is a navigable stream; that said bridge is a nuisance, a great and irreparable injury to the property located above said bridge, and an unlawful obstruction to a navigable stream; that said plaintiff in error in erecting and maintaining said bridge has misused a franchise conferred upon it by law, and claims a right in contravention of law, and exercises a franchise and privilege in contravention of law.

The petitioner prayed that the plaintiff in error be compelled to answer to the State of Ohio by what right it maintained said
b bridge, and that it may be ordered by the court to remove the same or locate a sufficient draw therein.

And said plaintiff in error represents furthermore that it duly made and filed its answer to said petition, in which it alleged, among other things, as follows:

"Second. And this defendant for a further and second defense to said action says that this court has no jurisdiction over the subject-matter of the several matters and things set forth in the plaintiff's petition and says that by virtue of the act of Congress passed September 19th, 1890, set forth in supplement to the Revised Statutes of the United States, volume 1, second edition, 1874–1891, sections 4, 5, and 7, the sole and exclusive jurisdiction of the matters and things set forth in plaintiff's petition are vested in the Secretary of War of the United States, and that the said Secretary of War has given this defendant no notice of any charges made in regard to the several matters and things set forth in plaintiff's petition; that the Federal Government of the United States having assumed and taken control of the subject-matter set forth in said petition, that the same is now a Federal question of which this court has no jurisdiction."

The said circuit court proceeded to hear and determine said cause and rendered its decision, in which it held and decided that said river

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C. W. Guy	54	39
John Stearns	58	42
E. J. Willie	62	45
John Castle	66	48
A. S. Bowker	78	57
Capt. Perry White	86	63
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R. O. Rote, Jr.	137	101
Findings of fact and conclusions of law	140	103
Judgment	142	104
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The said circuit court proceeded to hear and determine said cause and rendered its decision, in which it held and decided that said river

from Lake Erie to said point eighteen hundred feet above said bridg
is, in fact, a navigable stream, and "ordered, adjudged, and decree
that said defendant company be, and it is hereby, ousted from th
maintaining of said bridge at the location named and from
the franchise or privilege of maintaining any bridge at any
point not provided with a proper draw."

And said plaintiff in error further represents that at the ——
term, 1894, of the supreme court of Ohio, which is the highest
court of law and equity in said State in which a decision in said
case can be had, said order, judgment, and decree were by said su-
preme court of Ohio affirmed; all of which will more fully appear
by an authenticated transcript of the record in said case, herewith
filed.

The plaintiff in error says that in rendering said order, judg-
ment, and decree error intervened to its prejudice, as will appear
by said record, and that among the errors so intervening are the
following:

1. The subject-matter of said suit had been and was wholly taken
and removed from the jurisdiction of the courts of the State of Ohio
and vested in the Secretary of War of the United States and the
courts of the United States by the act of Congress passed Septem-
ber 19th, 1890, set forth in supplement to the Revised Statutes of
the United States, volume 1, second edition, 1874–1891, sections 4,
5, 7, and 10.

2. The courts of the State of Ohio had no jurisdiction to hear,
try, or determine the matters involved in said action or to make or
render the order, judgment, or decree above mentioned.

3. Said supreme court of Ohio erred in holding and determining
that the courts of said State had and have jurisdiction to hear and
determine the questions involved in said suit and in holding
and determining that the exercise of such jurisdiction by said
court was not repugnant to the provisions of the above-men-
tioned act of Congress.

4. The Ashtabula river at the place where it is crossed by the
bridge in question is navigable water of the United States, and the
bridge in question is navigable water of the United States, and the
power conferred by the Constitution upon Congress to regulate com-
merce comprehends the control of said river and navigable waters
for that purpose and to the extent necessary, and is paramount and
free from interference by the States, and the attempt in this case on
the part of the State by and through its courts to regulate and con-
trol the bridging over or use of such navigable waters of the United
States was and is in excess of the power of the State and an unlaw-
ful interference in a matter which is exclusively committed to and
within the jurisdiction of Congress and the Federal authorities.

5. The order, judgment, and decree aforesaid of said supreme
court of Ohio was and is erroneous, contrary to and without au-
thority of law, in violation and contravention of the Constitution
of the United States and of the act of Congress aforesaid.

The plaintiff in error prays that said order, judgment, and decree
may be reversed.

GEO. C. GREENE,
Attorney for Plaintiff in Error.

[Endorsed:] Filed Jul- 20, 1894. In supreme court of Ohio. J. B. Allen, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the supreme court of Ohio, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The Lake Shore and Michigan Southern Railway Company, plaintiff in error, and The State of Ohio *ex rel.* Russell C. Humphrey, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 17th day of July, A. D. 1894.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD, *Clerk,*
By JNO. VAN NOSTRAN, *Deputy.*

Allowed by me with a supersedeas.

FRANKLIN J. DICKMAN,
Chief Justice of the Supreme Court of the State of Ohio.

g STATE OF OHIO, } *ss:*
City of Columbus, }

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same before the judges within named, in a certain authenticated transcript to this writ attached, do send, as within commanded.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court this 20th day of July, 1894.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy Clerk.*

[Endorsed:] Filed Jul- 20, 1894. In supreme court of Ohio. J. B. Allen, clerk.

h UNITED STATES OF AMERICA, *ss:*

To the State of Ohio *ex rel.* Russell C. Humphrey, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Ohio, wherein The Lake Shore and Michigan Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered by said State court against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Franklin J. Dickman, chief justice of the supreme court of Ohio, this seventh day of July, 1894.

FRANKLIN J. DICKMAN,
Chief Justice of the Supreme Court of Ohio.

We hereby acknowledge service of a copy of the above citation this seventh day of July, 1894.

BURTON AND DAKE,
Attorneys for Defendant in Error.

[Endorsed:] Filed Jul- 20, 1894. In supreme court of Ohio. J. B. Allen, clerk.

i In Supreme Court of Ohio.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Defendant in Error.
} Supersedeas Bond.

Know all men by these presents that we, The Lake Shore and Michigan Southern Railway Company, Addison Hills, and O. G. Getzen-Danner, citizens of the State of Ohio, are held and firmly bound unto the State of Ohio in the full and just sum of one thousand dollars ($1,000.00); for the payment of which, well and truly to be made, we do jointly and severally bind ourselves, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 7th day of July, A. D. 1894.

Whereas on the 15th day of May, 1894, in a suit pending in the supreme court of Ohio between the said The Lake Shore and Michigan Southern Railway Company, plaintiff in error, and The State of Ohio *ex rel.* Russell C. Humphrey, defendant in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error has obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the
j judgment in said suit, and has caused a citation to be issued, directed to said defendant in error, citing and admonishing said defendant to be and appear at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of this obligation is such that if the said The Lake Shore and Michigan Southern Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make good its plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

[Seal Lake Shore & Michigan Southern Railway Co.]

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By JOHN NEWELL, *P't.*
ADDISON HILLS. [SEAL.]

Attest: N. BARTLETT,
Ass't Secretary.

O. G. GETZEN-DANNER. [SEAL.]

Approved by—
LEVI E. MEACHAM, *Clerk.*

[Seal of the Circuit Court of Ohio, Cuyahoga County.]

O. K.
BURTON & DAKE,
Att'ys for Def't in Error.

k STATE OF OHIO, } ss:
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the foregoing is a duplicate of the supersedeas bond for writ of error to the supreme court of Ohio in the case of The Lake Shore & Michigan Southern Railway Company against The State of Ohio *ex rel.* Russell C. Humphrey, on file in my office.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this twentieth day of July, A. D. 1894.

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

[Endorsed:] Filed Jul- 20, 1894. In supreme court of Ohio. J. B. Allen, clerk.

l *Transcript of Docket and Journal Entries.*

STATE OF OHIO, }
City of Columbus. }

Supreme Court of the State of Ohio, of the Term of January, A. D. 1893.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *vs.* THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY. } No. 3710. Error to the Circuit Court of Cuyahoga County.

Date.	Memoranda.
Aug. 9th, 1893.	—Petition in error & waiver of summons filed.
" " "	—Circuit court transcript filed.
" " "	—Original papers and bill of exceptions filed.
" " "	—Printed record filed (a true copy of which is attached at the end hereof, marked Exhibit "A").
Sept. 29th, "	—Motion by defendant to advance & notice filed.
Oct. 10th, "	—"Ordered by the court that said motion be, and the same is hereby, allowed and request for oral argument is noted." O. B. 13, page 191.
Dec. 8th, "	—Plaintiff's printed briefs and proof of service filed.
Feb'y 5th, 1894.	—Defendant's printed briefs filed.
" 19th, "	—Proof of service of defendant's printed briefs filed.

May 15th, " —"This cause came on to be heard upon the transcript of the record of the circuit court of Cuyahoga county and was argued by counsel. On consideration whereof it is ordered and

adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed, and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in
m error its costs herein expended, taxed at $—.

Ordered that a special mandate be sent the circuit court of Cuyahoga county to carry this judgment into execution.

To all of which judgment and order of the court the plaintiff, by its counsel, excepts."

May 22nd, 1894.—"On motion of the plaintiff in error, The Lake Shore & Michigan Southern Railway Company, this court orders it to be certified and made a part of the record in this cause and of the decree heretofore rendered that in the rendition of said decree it became and was necessary and material to the case to determine whether the subject-matter of this suit had not been wholly taken from the courts of this State and the jurisdiction of the matters and things set forth in the petition of the relator filed in this case vested exclusively in the Secretary of War of the United States and the Federal courts by the act of Congress passed September 19th, 1890, entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, set forth and contained in the supplement to the Revised Statutes of the United States, volume I, second edition, 1874–1891, sections 4, 5, 7, & 10, the plaintiff in error claiming that the courts of this State had and have no jurisdiction to hear and determine the questions involved herein by reason of the provisions of said act of Congress, and that the exercise of such jurisdiction by this court and the court below was and is repugnant to the provisions of said law; but the said court and this court held and determined that the same were not repugnant to said act of Congress and that the courts of this State have jurisdiction to hear and determine the questions involved herein, and this court holds and decides herein against the said claim so made by the plaintiff in error.

n And it is further certified that this court is the highest court in this State in which a decision of this case can be had."

May 22nd, 1894.—Mandate issued.
" " " —Original papers sent to clerk.
July 20th, " —Application for writ of error, copy of writ of error, bond for supersedeas, and copy of citation & return filed.

Costs.

Filing petition in error,	$5.00,	paid by	Estep, Dickey, Carr & Goff.
" motion,	2.00,	"	Burton & Dake.
Transcript,	3.00,	"	F. J. Jerome.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 3710, The L. S. & M. S. R'y Co. *vs.* The State of Ohio *ex rel.* Russell C. Humphrey, and that the same are truly taken and correctly copied from the records of said court, to wit:

From Order Book No. 13, pages 451 and 459, and Minute Book No. 16, page 127.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this twentieth day of July, A. D. 1894.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

1 In the Supreme Court of the State of Ohio.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Defendant in Error.

Petition in Error, in *Quo Warranto*.

The Lake Shore & Michigan Southern Railway Company, plaintiff in error, says that at the January term of the circuit court within and for the county of Cuyahoga and State of Ohio, A. D. 1893, The State of Ohio, *ex rel.* Russell C. Humphrey, defendant in error, recovered a judgment by the consideration of said court, against plaintiff in error, in an action then pending therein, wherein defendant in error was plaintiff, and plaintiff in error was defendant, a transcript of the docket and journal entries whereof, is filed herewith. Plaintiff says, that there is error in the said record and proceedings, in this to wit:

2 First. Said court erred in overruling the motion of plaintiff in error to make the petition of defendant in error more definite, specific and certain, and to strike out therefrom certain matters as appears from said motion.

Second. Said court erred in overruling the demurrer of plaintiff in error to the petition of defendant in error.

Third. Said court erred in overruling the motion of plaintiff in error to strike from the files of the court, the reply of defendant in error.

Fourth. Said court erred in overruling the demurrer of plaintiff in error to the reply of defendant in error.

Fifth. Said court erred in overruling the motion of plaintiff in error for a new trial in said action and proceeding.

Sixth. Said court erred in its findings of fact in said proceeding, the same not being sustained by sufficient evidence.

Seventh. Said court erred in its pretended conclusions of law, as appears from the record herein, the same being contrary to the law of the land.

Eighth. Said court erred in the judgment rendered by it in said

cause and proceeding, as appears from the record thereof, for the reason that it had no jurisdiction to render such judgment.

Ninth. Said judgment was given for the said defendant in error when it ought to have been given for the said Lake Shore & Michigan Southern Railway Company.

Tenth. Said court erred in the admission of the evidence of the said defendant in error, to which the said Lake Shore & Michigan Southern Railway Company objected.

3 Eleventh. Said court erred in ruling out the evidence offered by the said Lake Shore & Michigan Southern Railway Company.

Twelfth. For other errors, apparent from the face of said record.

Plaintiff in error therefore prays, that said judgment, order and decree may be reversed, and that it may be restored to all things it has lost by reason thereof.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Plaintiff in Error.

O. G. GETZEN-DANNER,
Of Counsel for Plaintiff.

CLEVELAND, O., *July* 11, 1893.

Now comes the defendant in error, and waives the issuing and service of summons in the above-entitled action; and enters his appearance herein.

BURTON & DAKE,
Attorneys for Defendant in Error.

4 STATE OF OHIO, *Cuyahoga County,* } *ss:*

In the Circuit Court of the Eighth Judicial District.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant.
} Petition in *Quo Warranto.*

To the honorable judges of the circuit court of the eighth judicial circuit within and for the county of Cuyahoga and State of Ohio:

W. B. Neff, prosecuting attorney for said county of Cuyahoga, in the name of the State of Ohio, and on the relation of Russell C. Humphrey now comes into court and gives the court to understand and be informed:

That defendant is a corporation, having a place of business, and its main office in the said county of Cuyahoga.

Said defendant was organized under the laws of the State of Ohio, for the purpose of operating a railway through said State, with certain branches thereto.

5 Said defendant, as a part of its system of railroads, owns and operates a branch line, extending from Lake Erie at Ashtabula harbor in the city and county of Ashtabula, in said State, southerly and southeasterly to the boundary line of the State of Pennsylvania and beyond, and also by another division to Youngstown in said State.

The route of said branch line crosses Ashtabula river in Ashtabula county in said State, at a distance of about one mile from the mouth of said river, where the same empties into Lake Erie. At the aforesaid place of crossing said river, defendant has for nineteen years past maintained and operated a bridge for the passage of its freight trains. In the original construction of said bridge, about the month of September, 1872, there was a draw therein, affording a passage which was thirty-six feet in width for the passage of vessels and such articles of commerce as might be floated upon said river.

The said draw was maintained for a period, the exact length of which the relator is unable to state, but as he is informed and believes, for eight years after the original construction thereof, namely, until the year 1880, at which time the said draw was removed and a truss bridge was located by the defendant company across the said river at the same place, which said bridge is still maintained by the defendant company. The framework of said bridge is located some twelve feet above the usual level of the water of said river, and there are abutments at each end, which extend for a considerable distance into the bed of the stream. The said Ashtabula

6 river at the place of crossing is about 140 feet in width; at the middle of the channel it is not less than twelve feet, and as the relator is informed, at the time of constructing said bridge was eighteen feet in depth. From its mouth to a point a considerable distance above said bridge, the said river is a navigable stream upon which for nearly all the distance below said bridge, on both sides of the channel, docks are located, doing a very large business in the handling of various freights, brought from or carried out upon Lake Erie and connecting waters, by boats, and but for the obstruction caused by said bridge docks would be located and freight handled by boats above said bridge.

The said bridge was first constructed, and the truss bridge was located upon the abutments aforesaid, without the consent of the board of public works of the State of Ohio, and without lawful authority from any source.

Said bridge is a nuisance, a great and irreparable injury to the property located above said bridge, and an unlawful obstruction to a navigable stream, located within the State of Ohio. In erecting and maintaining the same the defendant has misused, and now misuses a franchise conferred upon it by law, and said defendant claims a right in contravention of law. And further the said defendant in maintaining the said bridge has exercised, and now exercises a privilege and franchise in contravention of law.

Wherefore the said prosecuting attorney in the name of the State of Ohio and on the relation of Russell C. Humphrey aforesaid,

prays the advice and judgment of the court in the premises,
7 and for due process of law against the said defendant, that it may be compelled to answer to the said State of Ohio by what right it maintains the said bridge at the location aforesaid, and that the said defendant may be ordered by the court to remove the same, or locate a sufficient draw therein and for such further order of the court as may be just in the premises.

BURTON & DAKE,
Attorneys for the Relator.

W. B. NEFF,
Prosecuting Attorney.

STATE OF OHIO, }
Cuyahoga County, } *ss:*

Russell C. Humphrey, being first duly sworn, says he is the relator named in the above petition in *quo warranto*, and that the facts stated and allegations made in the said petition are true.

RUSSELL C. HUMPHREY.

Sworn to before me by the said Russell C. Humphrey, and by him subscribed in my presence this 7th day of April, 1892.

EDWIN H. KELLEY,
Notary Public.

8 STATE OF OHIO, }
Cuyahoga County, } *ss:*

In the Circuit Court for the Eighth Judicial District.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY,
Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant.
} Precipe.

To the clerk:

Issue a summons in the above-entitled cause, returnable according to law. Action in *quo warranto.*

BURTON & DAKE,
Attorneys for Relator,
And for W. B. NEFF,
Prosecuting Attorney.

9 THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

In the Circuit Court for the Eighth Judicial Circuit.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant. } Motion.

Now comes The Lake Shore & Michigan Southern Railway Company, defendant, and moves the court for an order requiring the said plaintiffs to make the following allegations of said petition more definite, specific and certain, to wit:

First. "In erecting and maintaining the same, the defendant has misused, and now misuses a franchise conferred upon it by law," by requiring the said plaintiffs to set forth and state in said petition, what franchise conferred upon it by law, it has misused; for the reason that the same does not appear upon the face of said petition.

Second. "And said defendant claims a right in contraven-
10 tion of law," by requiring said plaintiffs to set forth and state what right the said defendant claims in contravention of law.

Third. "And further the said defendant, in maintaining the said bridge, has exercised and now exercises a privilege and franchise in contravention of law," by requiring the said plaintiffs to set forth and state, what franchise the said defendant has exercised and what franchise the defendant now exercises and what privilege the defendant has exercised and what privilege the said defendant now exercises in contravention of law.

Second. And the defendant The Lake Shore & Michigan Southern Railway Company now comes, and in case the aforesaid motion is overruled, then said defendant asks the court severally for an order, striking out each of the following allegations, from said petition, to wit:

First. "In erecting and maintaining the same the defendant has misused and now misuses a franchise conferred upon it by law."

Second. "And said defendant claims a right in contravention of law."

Third. "And further the said defendant, in maintaining the said bridge, has exercised and now exercises a privilege and franchise in contravention of law."

For the reason that each of the aforesaid allegations in said petition contained, are not averments of fact, are simply conclusions, and are redundant, irrelevant and surplusage.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

O. G. GETZEN-DANNER,
Of Counsel for Defendant.

11 THE STATE OF OHIO, } ss:
Cuyahoga County, }

In the Circuit Court for the Eighth Judicial Circuit.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant. } Demurrer.

And now comes the Lake Shore & Michigan Southern Railway Company, and demurs to the petition of plaintiff herein, and for causes of demurrer, says:

First. That the petition of plaintiffs herein, does not state facts sufficient to constitute a cause of action against this defendant.

Second. That this court has no jurisdiction of the subject of this action.

Third. That the plaintiffs have not legal capacity to sue.

12 Fourth. That there is a misjoinder of parties plaintiff.

Fifth. That there is a defect of parties plaintiff.

Wherefore, this defendant asks if it shall be required to answer said petition.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

O. G. GETZEN-DANNER,
Of Counsel for Defendant.

13 STATE OF OHIO, } ss:
Cuyahoga County, }

In the Circuit Court for the Eighth Judicial District.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant. } *Quo Warranto.* Answer.

The above-named defendant The Lake Shore & Michigan Southern Railway Company, for answer to the petition of plaintiff herein says, that it admits that it is a corporation, having a place of business and an office in the said county of Cuyahoga; that it was organized under the laws of the State of Ohio, and among other things for the purpose of operating a railway through said State. That, as a part of its system of railroads, it owns and operates a line extending from Lake Erie at Ashtabula harbor in the city and county of Ashtabula, in said State, southerly and southeasterly to the boundary line of the State of Pennsylvania, and beyond, and also a line to Youngstown in said State. That the route of said line crosses Ashtabula river in Ashtabula county in said

14 State, at a distance of one mile or more from the mouth of said river, where the same empties into Lake Erie. That at

the aforesaid place of crossing said river, this defendant and its predecessors, has for nineteen years past, maintained and operated a bridge, for the passage of its freight trains, as well as other trains. That in the construction of the original bridge across said stream there was a draw therein, affording a passage which was thirty-six feet in width. That said bridge was maintained until about the year 1880, after which the present bridge across said river was constructed and located by this defendant, and where said bridge is still maintained. That the framework of said bridge is twelve feet above the usual level of said river and that there are abutments at each end of said bridge, which extend into the stream. That the said Ashtabula river is about 140 feet in width. That below said bridge there are docks located on both sides of the channel of said river. That below said bridge and near the mouth of said river, the same is navigable for a certain class of boats. And this defendant denies each, all and singular of the other allegations in said petition contained, not herein specifically admitted.

Second. And this defendant for a further and second defense to said action, says that this court has no jurisdiction over the subject-matter of the several matters and things set forth in the plaintiff's petition, and says: That by virtue of the act of Congress, passed September 19th, 1890, set forth in Supplement to the Revised Statutes of the United States, volume 1, second edition 1874–1891,
15 sections 4, 5 and 7, the sole and exclusive jurisdiction of the matters and things set forth in plaintiff's petition, are vested in the Secretary of War of the United States and that the said Secretary of War has given this defendant no notice of any charges made in regard to the several matters and things set forth in plaintiff's petition. That the Federal Government of the United States having assumed and taken control of the subject-matter set forth in said petition, that the same is now a Federal question, of which this court has no jurisdiction.

Wherefore, this defendant prays to be hence dismissed with its costs.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

O. G. GETZEN-DANNER,
Of Counsel for Defendant.

STATE OF OHIO, }
Cuyahoga County, } *ss:*

Personally came W. H. Canniff, who being first duly sworn, says that he is the agent of the defendant The Lake Shore & Michigan Southern Railway Company, in the above-entitled cause, duly authorized in the premises; and that the facts stated and allegations contained in the foregoing answer are true as he verily believes.

W. H. CANNIFF.

Signed by the said W. H. Canniff, in my presence and by him sworn to before me on this 20th day of February, 1893.

L. ROOD LOOMIS,
Notary Public.

16 STATE OF OHIO, *Cuyahoga County,* } ss:

In the Circuit Court.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY *vs.* THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY. } Reply of Relator to Answer of Defendant.

The State of Ohio, by Russell C. Humphrey, relator, for reply to the answer heretofore filed by defendant in this cause, reiterates the statements heretofore made in the petition filed at the beginning of this case.

Further replying, the said relator says:

The Government of the United States, by the Secretary of War, has no jurisdiction as to the locality of the bridge complained of in the petition.

Second. The questions raised by the said answer as to the jurisdiction over said bridge, have heretofore been decided in this cause, adversely to the contention of the defendant.

BURTON & DAKE,
Attorneys for Plaintiff.

17 STATE OF OHIO, *Cuyahoga County,* } ss:

T. E. Burton, one of the attorneys for relator in this cause, being duly sworn, says the facts stated and allegations made in the foregoing reply are true as he believes.

T. E. BURTON.

Sworn to and subscribed before me by the said T. E. Burton this 25th day of February, 1893.

MAHLON M. CHEW,
Notary Public.

18 STATE OF OHIO, *Cuyahoga County,* } ss:

In the Circuit Court.

STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff, *vs.* THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant. } No. 1111. Motion.

Now comes The Lake Shore & Michigan Southern Railway Company, defendant in the above-entitled case, and moves the court for an order, striking the pretended reply filed herein, to the answer of this defendant, from the files of this court for the following reasons, to wit:

First. That the statements in said pretended reply are not proper

matters of reply to the matters and things in the answer of this defendant set forth, and do not constitute an avoidance of the allegations in this defendant's answer.

19 Second. That each and all the several matters and things set forth in said pretended reply are redundant, irrelevant, and surplusage.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

O. G. GETZEN-DANNER,
Of Counsel for Defendant.

Brief.

For brief see sec. 5087, Revised Statutes of Ohio.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

20 STATE OF OHIO, }
Cuyahoga County, } *ss:*

In the Circuit Court.

STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Plaintiff,
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant. } No. 1111. Demurrer.

Now comes The Lake Shore & Michigan Southern Railway Company, defendant herein, and demurs to the reply of the plaintiff filed in this case, and for cause of demurrer, says: That the several matters and things set forth in said pretended reply, do not in law, constitute matters of avoidance, answer, or reply to the several matters and things set forth in this defendant's answer herein.

Wherefore this defendant prays the judgment of the court as to whether it shall be required to make proof of the matters in issue in this case, and as to whether it is not entitled to judgment on the pleadings, without the introduction of evidence or testimony.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendant.

O. G. GETZEN-DANNER,
Of Counsel for Defendant.

21 STATE OF OHIO, *Cuyahoga County,* } ss:

In the Circuit Court.

THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.
No. 1111.
Quo Warranto.

January term, 1892, (May 24.)—Petition and precipe filed.

May 24, 1892.—To court: The motion by William B. Neff, prosecuting attorney, for leave to file a petition in *quo warranto* is heard and granted, due notice having been given to defendant. To the granting of said motion defendant expects. Journal 3–211.

September 17, 1892.—Motion by defendant to make petition more definite and certain or to strike from same filed. Continued.

October term, 1892, (November 4.)—To court: The motion to require the relator to make his petition more definite and certain and to strike out thereform is heard and overruled. Journal 4–2.

22 November 11, 1892.—Demurrer by defendant to petition filed. Continued.

January term, 1893, (February 8.)—To court: The demurrer by the defendant to the petition is heard and overruled. Journal 4–30.

February 22, 1893.—Answer filed.

February 25, 1893.—Reply filed.

March 9, 1893.—Depositions on behalf of plaintiff taken before Edward T. Hall, N. P., filed.

March 10, 1893.—Motion by defendants to strike reply from the files with brief filed.

March 18, 1893.—Demurrer by defendant to reply filed.

March 25, 1893.—To court: The motion by the defendant to strike the plaintiff's reply from the files and the demurrer by defendant to said reply, are both heard and overruled, to both of which rulings the defendant excepts. Journal 4–30.

June 9, 1893.—Motion by defendant for a new trial filed.

May 26, 1893.—To court: This day this cause came on for hearing upon the petition of plaintiff, answer of defendant and plaintiff's reply thereto, exhibits and testimony, and the defendant requested the court to state in writing the conclusions of fact found, separately from the conclusions of law. And thereupon after arguments of counsel, and upon due consideration, the court being fully advised in the premises finds the facts of this cause as follows:

That the depth of water in said river at the point where the
23 bridge of the defendant company crosses the same, is at a low stage of water, seven feet deep and has a depth of at least five feet from that point for a distance of at least eighteen hundred feet above the bridge. That the width of the channel for said eighteen hundred feet is 140 feet. From the said bridge to the lake the water is still deeper, and there is nothing to obstruct the free passage of boats to and from the lake. And that boats drawing not to exceed five feet of water, might, except for the bridge in

question, pass to and from Lake Erie, to said point at least eighteen hundred feet above said bridge. That said river from Lake Erie to said point at least eighteen hundred feet above said bridge is in fact a navigable stream. That boats used in navigating Lake Erie and which came into said river for commercial purposes, draw from four to eighteen feet of water. That a large amount of freight consisting of iron ore, coal, lumber and other articles of commerce is brought into said river from other ports and delivered at the docks upon said river, and in like manner a large amount of freight is received from said docks by such vessels for carriage to other ports. That substantially all the lands that can be used for dock below said bridge are owned and used by the defendant and other railroad companies. There is some demand for docks above the bridge in question upon said navigable waters of said river. That it is practicable for the defendant railroad company to use a draw or swing bridge in place of the one that it now maintains there, being the bridge in controversy herein. That as said bridge was built and is still maintained, vessels navigating said river cannot pass above said bridge.

24 As conclusions of law the court finds that said defendant has misused its power and franchise in building and maintaining the bridge in question without a draw by which vessels can pass said bridge, and that it ought to be ousted from the continuance of such bridge without proper draws. To each of the foregoing findings of fact, and to each of said conclusions of law, the said defendant excepts. And thereupon the defendant files its motion for a new trial of this cause and to set aside and vacate said findings of fact and conclusions of law, which motion is heard and overruled, to which ruling the defendant excepts. And the court, being fully advised in the premises, finds that relief should be granted against the defendant as prayed for in the petition. It is therefore ordered, adjudged and decreed that said defendant company be, and it hereby is ousted from the maintaining of said bridge at the location named and from the franchise or privilege of maintaining any bridge at said point, not provided with a proper draw. It is further considered that plaintiff recover from said defendant his cost of this action to be taxed. To each of the foregoing order, judgments, and decree, the defendant excepts and is allowed forty days to file a bill of exceptions. And the amount of the bond for supersedeas is fixed at $1,000.00. Journal 4–62.

July 5, 1893.—Bill of exceptions by defendant filed.

25 THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

I, Levi E. Meacham, clerk of the circuit court, in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court in the above-entitled cause. And I also certify that the enclosed are the original papers and pleadings filed in said cause, in said circuit court.

Witness my hand and the seal of said court, at Cleveland, this 7th day of July, 1893.

LEVI E. MEACHAM, *Clerk*,
By FRED. J. DENZLER,
Deputy Clerk.

26 State of Ohio, Cuyahoga County, Circuit Court.

STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY
vs.
THE LAKE SHORE & MICHIGAN SOUTHERN R'Y COMPANY. } Bill of Exceptions.

Be it remembered, that on the trial of this action, at the January term, 1893, of the said circuit court of Cuyahoga county, before Hons. C. C. Baldwin, Hugh J. Caldwell and George R. Haynes, judges, the plaintiff further to maintain the issue on his part, offered and read in evidence from the deposition of N. J. Strong, the following:

N. J. STRONG, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. You live at Ashtabula?
A. Yes, sir.
Q. How long have you lived at Ashtabula?
A. Forty-seven years; that is, I have not lived here all the
27 time. I was in Madison three years, Geneva three years, and I left here and was one year East.
Q. What part of Ashtabula have you lived?
A. Born and bred at the harbor. For the last fifteen or twenty years I have lived at South Main street, No. 412.
Q. During that time have you known the Ashtabula river?
A. Yes, sir.
Q. Have you known its size and depth?
A. Yes, sir, to a certain extent.
Q. Have you known of the traffic upon it?
A. Yes, sir, somewhat.
Q. Please state in detail the facts in regard to the size of the river, including width, depth and traffic upon it during the time of your remembrance from the lake to the point above the railroad bridge of the Lake Shore railroad belonging to the Youngstown & Jamestown branch?

Objected to as far as it relates to traffic at and above the bridge.

A. The river from deep water to the bend in the creek would be about a mile or a mile and a half from the end of the pier, that would be as far as the boats went drawing eight feet.
Q. How far would that bend of Fisherman's point be above the pile bridge of the Lake Shore & Michigan Southern railway?
A. About 500 feet.

Q. Above that at the place known as the wash bank, what would be the depth of water?

Defendant objects.

Q. State if you know?

A. Yes, sir, I know. I used to go in swimming there sometimes. It would average about four feet.

Q. How far is it from Fisherman's point to this known as the wash bank?

A. About 40 rods.

Q. Then above the wash bank, what can you say of the
28 water above the wash bank?

A. There was a deep hole of eighteen or twenty feet of water. I don't know how far that did extend up, I should judge ten or fifteen rods.

Q. State the facts as to whether this depth has been, during the time of your residence in Ashtabula, uniform or not.

Objected to as leading.

A. Yes, sir, it was generally uniform; very little variation in the depth of the water except in time of freshet.

Q. What is the variation of depth as between winter and summer, if there is any rule as to that?

A. Between winter and summer there would not be much of any difference. In winter when frozen up the water is low, and just so in the summer during a dry time. I always found when it was frozen up the ice would settle down from the bank.

Q. About how many months in the year would there be ice in the river; say above the bridge there?

A. It would not average two months in the year.

Q. You refer to the bridge in controversy in this action?

A. Yes, sir, the pile bridge.

Q. What is about the width of the river from its mouth up to the wash bank, so called?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. The average width would be 150 feet probably, I should think so.

Q. How does the width at the bridge in controversy, the bridge on the branch of the Lake Shore railroad, and above that bend, compare with the width below the bridge?

A. From there to the wash bank, I should judge, a very
29 little narrower. I am speaking of what the river was originally but not up there. I should judge it was some over 100 feet.

Q. Please state more fully as to width above the bridge as compared with its width below.

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. From Fisherman's point beyond the wash bank I should judge it was some 40 feet narrower than it was below, and from the bridge up to Fisherman's point it was as wide as it was anywhere, if not wider.

Q. When you speak of the depth as you have spoken, how great a width is it of that depth?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Well, it would average that depth pretty much across the creek everywhere.

Q. Do you know as to the size of the harbor from traffic during the 40 years that you have lived in Ashtabula?

A. To a certain extent I do.

Q. Say, take it from 1845 to 1860, what would you say about that?

A. Well, some traffic in the way of shipments from here, lumber and staves, and a great deal of limestone brought in here, and lumber shipped.

Q. Could you give any estimate of the number of boats probably coming in within a year? I mean of the number of entry-s and clearances for loads?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

30 A. It would be very hard to get very close, it was so irregular as to whether the lumber would come in from the country. Sometimes there would be two or three a week, and then again there would not be more than one a week.

Q. Would that continue during the season of navigation?

A. Yes, sir.

Q. Say between 1860 and 1870, what would you say of the traffic?

A. Well, it was about the same; rather more shipping, I think.

Q. Between 1870 and 1880 what would you say?

A. That was about the time this road went in there and then it began to grow better; then it was quite an increase, of course, and has kept it up until there is great big boats down here now.

Q. What has been the tendency as to increase or decrease since the road was located in 1872 or 1873?

A. Been on the increase.

Q. What is the present tendency in that respect?

The COURT: Postpone that question. We have some doubt as to its admissibility.

A. Increase.

Q. You speak of lumber being shipped back in those early years; was it shipped out or in?

A. Out.

Q. At present, so far as lumber is concerned, is it brought in or shipped out?

A. Brought in.

Q. What are the principal articles of freight now handled at the harbor?

A. Ore, coal and lumber.

Q. Do you know as to the ownership of the property below that bridge in controversy?

A. Originally I did and somewhat now.

Q. What is the ownership below the bridge now?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

31 A. As I understand, the Lake Shore owns the east side principally and the A. Y. & P. railroad the west side.

Q. Do you know how large amount of property bordering the river below the bridge is owned by private parties?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. I do not know of any owned by private parties, until you get down below the swing bridge. From dock No. 1 Redhead and Ford owns some property in there.

To which answer the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

Q. Do you know how much?

Same objection, ruling and exception.

A. I believe that all below No. 1 dock from there to the bridge is owned by these parties.

Q. About how much could that be?

Same objection, ruling and exception.

A. I think about ten rods.

Q. On both sides?

Same objection, ruling and exception.

A. Only on one side, the east side; the west side is owned by the A. Y. & P. Railroad Company.

Q. Is that all that is owned by private parties?

A. That is all between the pile bridge and the swing bridge.

Q. Beyond the swing bridge how much is owned by private parties?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

32 A. From there down almost to the beginning of the pier is owned by private parties on the east side.

Q. How much is there of that?

A. Two acres.

Q. How much frontage on the river?

A. Ten or fifteen rods, maybe twenty rods. That is all owned by private parties below the bridge. I cannot state how much, for I don't know how far down the Lake Shore bought off.

Q. By private parties you mean individual owners as distinguished from the railroad companies?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Yes, sir.

Q. What railroads own land bordering on the river on each side?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. The Lake Shore owns the east side and the A. Y. & P. have the west side.

Q. Above the bridge of the Lake Shore railroad what is the ownership above the pile bridge?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. For a ways on the west side belongs to the Pennsylvania Co.

Q. How far is that?

A. Some forty or fifty rods.

Q. On the east side over the same distance what is the ownership?

33 To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. I don't know who owns it now. I don't know how far the railroad owns above the track. It was the Fields farm up to maybe ten or fifteen rods and then the Cook property. I do not know who owns that now.

Q. Does the Lake Shore own above the bridge?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. I can't say as to that.

Q. By the pile bridge you mean the bridge on the Lake Shore branch?

A. Yes, sir.

Q. On the main line it is an arch bridge?

A. No, sir; piles in the river.

Q. Is that bridge the same thing as originally constructed?

A. No, sir.

Q. What is the change?

A. In the first place there was a swing bridge.

Q. Do you know how long that swing bridge was maintained?

A. I do not. I understand that the swing bridge was put in some time after this railroad disaster.

Q. Are you referring to the bridge on the main line?

A. The bridge was built on the main line and it was taken from there and put down here.

Q. Now, as boats go up and down in that river, what can you say particularly with reference to the locality above that bridge of the Lake Shore in controversy?

A. Years ago I have heard father tell of boats going up——

Mr. HALL: Skip that.

—since my time I have taken a boat up beyond the bridge drawing six feet of water.

34 Q. How far above the bridge would they go?

A. Five or six rods. I went up with some A. Y. & P. men that came down to inspect the river to see what chance there was for improvements. I went up to the bend in the river and turned around up at Fisherman's point.

Q. How far is that above the railroad bridge?

A. 500 feet.

Q. What was the draft of your boat?

A. Something about six feet. We had a six-foot wheel all under water.

Q. What year was that?

A. Twenty-three years ago last summer.

Q. Have you been above that bridge with a tug or boat at any other time?

A. No, sir.

Q. Have you knowledge of other boats going above there?

A. No, sir, I have not.

Q. During the last twenty years — what part of town have you lived?

A. This end of town principally.

Q. Away from the harbor?

A. Yes, sir, until four years ago, in the spring I would go on the lake.

Cross-examination by Mr. HALL:

Q. What is your age?

A. Forty-seven years last Aug.

Q. Fisherman's point is about how far above the pile bridge?

A. That may be ten rods.

Q. And the wash bank, how far is that?

A. About thirty or forty rods.

Q. When was Plum point cut off and the course of the river changed?

Plaintiff objects.

A. I can't state exactly when that was cut through in the first place. I believe the last was taken out a year ago last summer, the last bend.

Q. When was the channel cut through so as to make an island?

A. I can't tell.

35 Q. When was it that boats began to go above the Bridge street bridge for purposes of traffic.

A. That is farther back than I can tell. They went up to the lime kiln on the bank near where the stone pier is, they used to go up there with lumber and stone as far back as I can recollect.

Q. That limekiln was before you rounded Plum point, was it not?

A. Yes, sir.

Q. Just above that there was a place that ships were built?

A. Yes, sir; there was a ship yard just below the limekiln.

Q. On the same side?

A. Yes, sir.

Q. And about where Mr. Manning's office now is there was a slaughter-house?

A. A slaughter-house. The ship yard originally was the slaughter-house, and afterwards the ship yard; and there used to be another slaughter-house up the creek further somewhere near where those Brown hoists are.

Q. There was not really any traffic in the vicinity of Plum point until the Lake Shore made the slip there?

A. There has been, twenty-one years ago last summer, I think it was, or twenty-two years, there was one or two loads of lumber came in and went almost up to where the pile bridge is at the present time, and unloaded there on the flats near where the round-house is.

Q. To whom was that consigned?

A. I can't tell you.

Q. What boat brought it?

A. I can't tell you now.

Q. Was that before Plum point was cut through?

A. Yes, sir.

Q. And before any channel was cut through that point?

A. Yes, sir.

Q. Were do you say that lumber was unloaded?

A. Up near where the pile bridge is near Willow point. Willow point is on the Fields farm.

Q. You cannot state what boat brought it?

36 A. No, sir; I can't now.

Q. Do you say it was done?

A. Yes, sir; I helped pile the lumber.

Q. Were you on the boat?

A. No, sir; I was working for Seymour, Giddings & Co.

Q. How did that lumber get out of there?

A. Drew up by teams.

Q. Over what road?

A. Across the flats and upon Lake street uptown.

Q. Over what road?

A. Over Lake street.

Q. Over what road from the flats to Lake street?

A. There was a road went down right back of these barns there. There was no name to the road; just a private road.

Q. Back of whose barn?

A. David Strong's, it was at that time.

Q. How long since you discontinued living there on the old farm?

A. Twenty-five or twenty-six years ago, I think it was somewhere thereabouts.

Q. When did you ever make any sounding of the depth of water at and above the pile bridge?

A. At various times, when I was a boy there, I used to fish a good deal in the spring of the year and used to set night lines and I had got to see if I was getting them down; sank sinkers to see how deep it was to get them in. I spent a good deal of my boyhood days on the river.

Q. Did you ever make any other soundings than you have stated?

A. Only when I took the tug up the river, I sounded along to see if there was anything to hinder going up.

Q. Where did you begin sounding when you went up with the tug?

A. At the mouth of what used to be the Old Field's run.

Q. What was the name of that tug?

A. Fred. & Will.

Q. And you went as far as Fish point, did you?

A. Yes, sir.

Q. What was the tonnage of that tug?

37 A. Ten ton and eight one-hundredths, I think. If I remember right that is gross tonnage, custom-house tonnage.

Q. The depth of the river at and above the pile bridge differs greatly, does it not, with the different seasons?

A. Not a great sight.

Q. What year was it that you went up with the tug?

A. I can't tell the exact year, but twenty-three years ago last summer, I think it was. It was the year or the year before I was married, and I was married twenty-three years last spring.

Q. When you speak of the ownership of different tracts of land, you have no knowledge, have you, except hearsay?

A. No, sir; I have not.

Redirect examination by Mr. BURTON:

Q. What point is opposite this Fisherman's point?

A. No point opposite; there is a bend in the river.

Q. On reflection, what distance would you say Fisherman's point was above the pile bridge?

A. 500 feet.

Q. Is it on the easterly or westerly side of the river?

A. On the west side of the river.

Q. That Plum point of which you speak where was that?

A. It was across the river from Manning's office, the Lake Shore office.

Q. This road to Lake street, of which you speak, up which lumber was hauled, is that now in existence?

A. Where it goes down the hill is in existence, but the iron-ore piles on the flats obstruct a team from going to the creek.

Q. As is true, of course, to the river below the bridge, I mean with reference to obstructions in the way of piles of iron ore from going to and from the river with teams?

A. I don't think a team could go to the river anywhere
38 below the pile bridge at the present time, unless the ore is got away.

Q. You speak of fishing with a seine; when was that?

A. Twenty-five or thirty years ago.

Q. What depth of water would be required to fish with this seine?

A. Not particular, anywheres from ten to twenty feet.

Q. Where was it that you fished with this seine?

A. At Fisherman's point, at Willow point and in Washing hole down near Plum point; all the places were near the yard station on the A. Y. & P. side.

Q. Is that above or below the pile bridge?

A. That was originally about half way from Willow point to Plum point.

Q. Willow point is below the pile bridge?

A. Yes, sir.

Q. You speak of the depth from Willow point to the pile bridge; what would you say the depth was along there?

A. It was originally about ten feet.

Q. What would you say it was now?

A. I can't say. Probably it is filled up now, as driving the piles across the creek would fill it up.

Q. How about this lumber yard of Seymore, Giddings & Co., did they have a lumber yard there?

A. No, sir, they had a factory here in town where the carriage factory is down here, or just below that, a sash and blind factory; they brought lumber in and my father was the company in the concern, and gave permission to put it on his land in order to save dockage at the harbor.

Q. This locality where this lumber was used was up the river?

A. The lumber was brought uptown for use.

Q. How long was that used as a place for unloading lumber?

A. Only one season.

Q. You speak of having no knowledge of ownership except
39 by hearsay of the land; do you know as to occupation of this land?

A. I know that at the present time the land below the bridge is used for dockage for the storage of ore and coal and above the bridge it has been wholly shut off from any use at all, because there is no way to get to it for farming purposes on the Pennsylvania side, but above that we could go down to the river over what used to be the Scoville farm.

Q. By farming purposes, what do you mean by that?

A. Raising crops of anything.

Q. Is it used for farming up there?

A. It don't seem to be nowadays.

Recross-examination by Mr. HALL:

Q. How many loads of lumber did you ever know to be brought up there?

A. I cannot say whether more than one or two, or not.

Q. Will you swear that there was more than one?

A. No, sir, for I did not help to unload more than one load.

Q. Where did you live from 1872 to 1880?

A. I lived part of the time uptown here, three years in Geneva, three years in Madison and one year East.

Q. Was not Plum point considerable distance down the river from opposite Manning's office?

A. Not originally, I don't think it was; Manning's office, well it might be a little; it was not a great ways at any rate.

N. J. STRONG.

The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of John Kulnane, the following:

JOHN KULNANE, of lawful age, being first duly sworn, according to law testified as follows, to wit:

40 Examination by Mr. BURTON:

Q. You are living in Ashtabula, are you?

A. Yes, sir.

Q. How long have you been there?

A. Twenty years in August.

Q. How have you been employed since you have been here?

A. Dredge business.

Q. I will ask you to state in what water you have done your work dredging.

A. I have been all over the country, Galveston and——

Q. Have you dredged the Ashtabula river?

A. Yes, sir.

Q. How far up have you dredged it?

A. When I first came we took the bar out the first thing we did after coming here. We called it the outer bar, and then the next orders was to commence at the A. Y. & P. slip and go to the spile bridge and take out the logs and obstructions.

Q. Did you do that?

A. Yes, sir.

Q. When was that?

A. A year or so after I came here, probably in 1877.

Q. From whom did you receive your instructions?

A. Mr. Stapper, general engineer of the Pennsylvania Company.

Q. What was the depth of the river from the lake up to the pile bridge?

A. It varied from the end of the pier at the bar about fifteen feet to upwards of sixteen and fourteen and one-half.

Q. Give in detail up to the pile bridge.

A. Going up we drew about six feet of water with the dredge, I

should say right there, there was between seven and eight feet of water.

Q. By the pile bridge?

Defendant objects.

A. To the lower side of the bridge, 100 feet or so.

41 Defendant objects.

Q. Just up to what point do you estimate the depth?

A. From above the A. & P. slip, this would be before the Lake Shore done any improvement, from the upper end of the Lake Shore dock No. 1, clear around Plum point and up to the pile bridge.

Q. Say 500 feet, just below the pile bridge, what would you say the depth was?

A. Seven or eight feet of water.

Q. How low did you clean out the river up to that point?

A. We went over getting logs out, that is all.

Q. Passing to another point, Captain, you have been familiar with the building of docks along the river, have you?

A. Some.

Q. What was the number and extent of the docks when you first came here?

A. When I came here there was what was called the A. & P. dock No. 1, that is all.

Q. Where was that and how long?

A. Probably that was about four or five hundred feet long.

Q. What year was that?

A. 1876.

Q. Please state in detail the additions made in the way of building docks down to the present time.

A. There was the A. & P. dock No. 2, built.

Q. When?

A. Some two or three years after.

Q. How long was that?

A. I should think the slip is about—in the neighborhood of four or five hundred feet.

Q. The next?

A. Number 3, on the opposite side of the slip.

Q. How long was that?

A. About the same distance.

Q. When was that built?

A. Three or four years after.

Q. The next after that?

A. Number 4, that was after Plum point was cut off.

Q. How long was that, about?

A. I can't say positive now.

Q. About what is the length of that No. 4?

42 A. Probably four or five hundred feet.

Q. What was the next dock built after that?

A. The extension of No. 4; we call it the crib dock.

Q. When was that?
A. About the same time after.
Q. About what is its length?
A. About 400 feet.
Q. The next after that?
A. The extension of crib No. 5. Then came the extension of No. 5 again.
Q. What is about the length of each of these two?
A. The crib dock is about 450 feet—I should say. The next one extended to that was 300 feet, and then came 300 feet again after that.
Q. Are these all on the Pennsylvania side?
A. Yes, sir.
Q. Were these all built before any were built by the Lake Shore?
A. No, sir.
Q. When was the first Lake Shore dock built?
A. I can't get at it now, sir, I did the first work for them.
Q. About when was that?
A. I think in '78 or '79. It was after these slips were done.
Q. What are the docks on the Lake Shore side?
A. No. 1—I can't name them now. They have changed the names. The plans have been altered. What we called the Collins dock, he was the engineer and surveyor, that was all torn up and alterations made.
Q. About what is the length of the docks of the A. Y. & P. and the Lake Shore respectively?
A. The Lake Shore has more frontage than they have.
Q. About how many feet?
A. I can't say the feet more than the Pennsylvania side.
Q. How far is the spile bridge above the docks of the Lake Shore and the A. & P. Company?
A. I should say 1,200 or 1,300 feet. It comes nearest, I think, to the A. & P. dock. There is not much difference, because I think they are on the last peg of the Collins and Slaughter survey.

43 Cross-examination by Mr. HALL:

Q. When and where did you first begin dredging above what is known as the Bridge-street bridge?
A. It was in '76.
Q. And where?
A. At the outer bar.
Q. I mean above the bridge.
A. We commenced that year above the pontoon bridge, as they called it.
Q. How far up the river did they dredge that year?
A. I went into the A. & P. side and commenced their slip.
Q. When and where did you first dredge in the old river bed above the old pontoon bridge?
A. In '76, I think it was.
Q. And where?

A. Along the A. & P. dock No. 1, cleaning it out from there into their slip and commenced on that and got orders to take out the logs along the river.

Q. Did you dredge around the bend and Plum point at any time?

A. I did not, sir.

Q. When was that?

A. I cannot tell you the date exactly, it was before Plum point was cut through. I worked for the Lake Shore Company then. It was after the No. 2 dock was built when Mr. Hepburn was here.

Q. How far up, sir, did you dredge that year?

A. Never went up there but once until they commenced improvements; only took out the logs.

Q. When was it that you went up, sir, that one time?

A. I think it was in '76 or '77.

Q. How far, sir, did you dredge that time?

A. Went clear to about 100 feet of the Lake Shore pile bridge where we could find any logs or trees that came down with the freshet.

Q. And is that the only time you ever dredged up there?

A. At that time. That is the only time at the commence-
44 ment, but we did afterwards as soon as the improvement commenced.

Q. You say you went within 100 feet of the pile bridge; what year was that?

A. '76 or '77.

Q. And is that the only time you went near the bridge?

A. That is all, sir; I was about two or three weeks during the work.

Q. Did you take out the logs and move the mud or did you dredge out all the material?

A. I know I took out logs, we had no orders to take out the mud.

Q. When doing that dredging, when you came within 100 feet of the pile bridge, what tug did you use?

A. I don't know whether the Dexter or the Dragon, I can't say which now.

Q. Who was captain of the tug you used?

A. George Field. He was the owner, at least.

Q. I mean who actually run it?

A. He had a man, sir; there were several captains; Captain Hardy and Captain Wells.

Q. I mean who was the captain of the tug on that one occasion?

A. I can't tell you.

Q. Can you name any of the crew at that time?

A. I cannot, sir, I think John Castle was engineer of her.

Q. Did you take any soundings?

A. Yes, sir, the dredge was soundings enough.

Q. Did you make any record of the soundings?

A. No, sir.

Q. You never went that far up at any other time?

A. No, sir; did afterwards, though, sir.

Q. When?

A. I guess about—we built a dredge there at that bridge at or time, I think it was twelve or thirteen years ago.

Q. How far below the bridge?

A. About forty feet, right in the fork between the two roads.

Q. Which side of the stream?

A. West side.

Q. On whose land?

A. Supposed to be the Pennsylvania land; I can't tell.

Q. Did you build that dredge in the summer or winter?

45 A. In the winter.

Q. You can't tell what year?

A. No, I can't tell, I think it is now about thirteen years old.

Q. Who worked with you in the building of that dredge?

A. I can't tell you who they were. The man who seemed to hav the contract of it was named Chapman.

Q. Did you build the dredge?

A. No, sir.

Q. What did you have to do with building the dredge in th winter?

A. Put the machinery in, etc., and looked after her more or less took the machinery out of the old hull and put into her.

Q. Did you do that?

A. Yes, sir.

Q. When?

A. The same spring?

Q. Can you name any carpenters that worked on it?

A. Yes, sir.

Q. Name them.

A. D. Elliot was one, there were some more of them, but it was s long ago and I did not pay much attention and have not though about the matter.

Q. And have not thought about the matter from that day unti this, until you were spoken to?

A. I was thinking how old she was that is all; she was so old w have got to have another one, that is all I was figuring on.

Q. This dredge was built for the Pennsylvania Company, was i not?

A. Yes, sir.

Q. On the Pennsylvania Company premises?

A. I don't know whether their premises or not.

Q. And at their docks, was it not?

A. Supposed to be, I don't know, I can't say as to that. She wa built there by the orders of the superintendent at that time.

Q. And built there at their docks?

A. There was no dock there.

Q. Built in a swamp?

A. On the clay ground or mud or whatever you call it.

Q. How was the timber brought there that was used on this dredge?

A. Came on the A. & P. road.

46 Q. How was the machinery brought there?

A. Fetched up from where the old hull was to the round-house and on flat cars from there.

Q. How was the timber taken from the cars to the place where it was used?

A. Just unloaded out of the cars to the ground.

Q. And used right there?

A. Yes, sir.

Redirect examination by Mr. BURTON:

Q. What was the size of that dredge?

A. We figure she would draw about six feet.

Q. She was launched there?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Yes, sir.

Q. About what distance away from the bridge?

A. Forty or fifty feet.

Recross-examination by Mr. HULL:

Q. So you remember for thirteen years that it was within forty feet of the bridge?

A. I think it was thirteen years.

Q. And you remember all this time where she lay?

A. Yes, sir.

Q. And you are able to fix it after thirteen years within forty feet of the bridge?

A. In that neighborhood.

Q. You are sure of one thing that the lumber was taken off the track and used where it was taken off?

A. Yes, sir.

JOHN KULNANE.

The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of William H. Tallman, the following:

47 WILLIAM H. TALLMAN, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. Do you live in Ashtabula?

A. Yes, sir.

Q. How long have you lived there?

A. I came here in '67; I was married in '69, that would date my residence, probably.

Q. What is your occupation at present?

A. Engineer.

Q. I will ask you to state whether you know of the sailing of

boats on the river to the present pile bridge or a point above th
at any time during your residence in Ashtabula?

A. Yes, sir.

Q. Please state when and what it was.

A. It was a passenger tug belonging to Mr. Watrous.

Q. What was its name?

A. Minner Warren.

Q. What was its size?

A. Sixty feet, I think.

Q. What was its draft?

A. She would draw either four or five feet of water, I nev
measured her.

Q. Were you on her?

A. Yes, sir.

Q. In what capacity?

A. Wheelsman or pilot.

Q. When was that?

A. In 1871.

Q. You may state on what occasion you went up the river an
where?

A. We used to take pleasure parties out into the lake, and whe
it was rough took them up the river.

Q. You may state how far up the river would you go?

A. Went up to what I call the wash bank where the bank com
down pretty steep.

Q. What is the locality of that with reference to the present pi
bridge of the Lake Shore railroad?

A. 1,000 or 1,500 feet.

Q. What years was that?

A. 1871; we had her part of two seasons between '71 and '72.

Q. From what place did she start?

48 A. Down by the old swing bridge, or the pontoon bridg

Q. Where was that?

A. At the foot of Bridge street.

Q. Can you recollect about how many times you went up there

A. We went up there twice in one day, I don't know but we di
three times.

Q. What was on board?

A. Some passengers, but I don't know where they came from.

Q. Do you know how many there was of them?

A. I can't tell now, quite a few.

Q. What is the fact as to there being—what kind of a channe
was there up to this point?

A. Good channel.

Q. Did you take soundings and take the depth of the water?

A. No, sir.

Q. Can you make any estimate as to the depth of the water ove
the course which you went up to this bank?

A. I cannot give it with any degree of certainty; I have set cat
fish lines in there and I think it was ten or twelve feet above th
bridge, and from that it shoals up.

Q. What is about the width of the river at the bridge and above there?

A. I cannot tell.

Q. Have you been familiar with the river since that time at all?

A. Yes, sir.

Q. What would you say as to the volume and depth of water now as compared with then?

A. It has been dredged out a good deal since, but not up there it has not, of course.

Q. What would you say as to the volume and quantity of water now as compared with then, whether more or less, I mean?

A. I don't know how to get that hardly; that depends a good deal on the season; of course the lake sets back there near the bank.

Q. How far does the lake set back?

A. I think it sets back above the wash bank.

49 Q. You say in '71 you took several passenger parties up the river?

A. Yes, sir.

Q. How many times you went you can't state?

A. I know we went twice in one day; there was no spile bridge there at that time.

Q. How many days did you go?

A. I don't say we went at all again; I say we went there two or three times in one day; two, I know, but I won't say we went any other days up there; we didn't have to go up there very often; when it was still we went outside.

Q. Then you mean at one time when there was some excursion at the lake and you couldn't go out in the lake, you made two or three trips up to the wash bank, but don't remember going up there on any other occasion with a tug, is that right?

A. That is about it, I think.

Q. And this was a little flat craft which you think from your recollection drew two or three feet of water?

A. I said from four to five feet of water.

Q. That is your recollection then after your attention is directed to it, is it not?

A. Yes, sir.

Q. Did you ever have your attention directed to the question as to how much water that little tug did draw?

A. I don't know as I did.

Q. What season of the year was that?

A. I think it was in July or August; it was a good while ago to remember the month; it was certainly in the season of '71.

Q. What season was it, as near as you can tell, that you set catfish lines on the river?

A. You've got me now again.

Q. How many years since you have done that, as far as you know?

A. Twelve or fifteen years, probably fifteen.

50 Q. And your recollection is at that time and at that place you found the water about ten feet in depth?

A. That is what I should calculate it was above the bridge there.

Q. You had no reason to remember the depth particularly?

A. I did not sound it myself at all.

Q. You merely think now after fifteen years, at the point where you set the lines you found the depth in the neighborhood of twelve feet, but did not notice particularly?

A. A person setting lines can form a little idea how deep the water is.

Q. And can they remember it twelve or fifteen years?

A. Of course, they would have an idea.

Q. There was a deep hole up there, was there not, that was a good place for catfish?

A. Yes, sir.

Q. Did you ever have occasion to measure or sound to see how far that deep hole extended down-stream?

A. No, sir, to make anything definite about it at all.

Q. That was at the point, was it not, that the boys used to call dead water?

A. I never heard it called dead water at all.

Q. How far was this below Eliza's island?

A. If you will get a map I will show you about how far we went; I can't tell you about that; where the bank strikes off pretty steep into the creek we used to call it wash bank.

Q. Was it at the lower end of the wash bank or further up?

A. Right at the lower end, pretty near the lower end.

Q. Did you ever take observations to ascertain how far the lake sets back?

A. No, sir, I did not.

Redirect examination by Mr. BURTON:

Q. What was the location of the catfish lines; how frequently did you locate them?

51 A. I can't tell, we used to go fishing with set lines all the way up the creek there.

Q. Then you did not locate them at any particular place?

A. No, sir, we would set them where we thought they would do the best.

Q. Were the locations selected for this catfishing above or below the pile bridge?

A. I set them both sides.

Q. How long was that?

A. I can't exactly tell.

Q. Where was it, immediately above?

Defendant objects.

A. Yes, sir.

Q. Where was it?

A. Right above the bridge where the river gives a bend down this way, it makes quite a wide place across there.

Q. How many feet is that above the bridge?
A. Directly above?
Q. That is how many feet where this so-called hole is located?
A. It cannot be over forty or fifty feet.
Q. How much space does it cover?
A. Probably two or three hundred feet.
Q. Square feet, do you mean?
A. No, sir.
Q. How many feet wide?
A. Fifty feet.
Q. State which side?
A. Westerly side.
Q. Do you know whether, in going up with this tug, you went over and through that hole?
A. Went right through it.
Q. How frequently did you take out these pleasure parties?
A. I don't know, we made quite a little business of it for that season.
Q. How frequently, about?
A. Maybe took out a number in one day and not have anything for three or four days.
Q. On the average, how many in a week or month do you say?
A. I can't say.
Q. Did you go up the river other times to a less distance than that?
A. Yes, sir, we used to go up to the bend below there—to the bend below the spile bridge.

52 Recross-examination by Mr. HALL:

Q. In speaking of taking out pleasure parties frequently, you mean into the lake, do you not?
A. Yes, sir.
Q. And you do not wish to change your answer that you have no recollection of going up beyond the spile bridge except that one day?
A. Only one day that I can call to memory.
Q. Do you wish to change your answer that this deep hole is just below the lower end of the wash bend?
A. I did not say that—probably two or three hundred feet from the bridge, that is my opinion. I did not measure it only I have set lines through there.
Q. As a matter of fact you have given no special attention to the matter as to the precise location of the deep hole where you set your line?
A. Not for several years.
Q. Did you not say in answer to my question a bit ago that the place where you found the deep hole and set the lines was just at the lower end of the wash bank?
A. I don't know, sir.
Q. Have you already forgotten that I asked you whether it was at the lower end or further up the bend and you said at the lower end?

A. You may call it the lower end, this side of it. I didn't say the lower end, probably three to five hundred feet from the lower end. I have not measured it.

Q. In fact you have made no measurements of any sort, have you?

A. Not particularly, no sir.

Q. The volume of water differs considerable in different seasons, does it not?

A. It changes and in the rainy seasons rivers are generally higher than in the dry seasons.

Q. Is it not true that for many years last past since the
53 country has been cleared up that the river is very much lower, take it the year through, than it used to be, and that it is subject to sudden freshets?

A. I cannot answer that question, the fore part of it certain. I know it is subject to freshets; then I think it makes a difference in the lake. A heavy westerly wind will raise the water a good deal in that creek; raise it somewhere two or three feet I have seen it raised.

Redirect examination by Mr. BURTON:

Q. With reference to this difference in the level of the water, how great a range would you say there was in the difference of the level of the water at this spile bridge and a thousand feet above?

A. I do not know how to answer that.

Q. Can you give an estimate on that?

A. No, sir, I don't think I can.

Q. What determines the height of water there at the bridge?

A. In the calm stretch I think the lake does, then some sudden freshet will raise the river and I think the lake sets back there.

Recross-examination by Mr. HALL:

Q. But you never made any observation or measured to see whether the lake sets back there or not, did you?

A. No, sir.

Redirect examination by Mr. BURTON:

Q. Which way does the current seem to flow?

A. I guess, if a fellow was in a skiff he would not move very fast down-stream, but he would move a little. In a heavy wind I think the water would go the other way above the bridge, because it is set back there.

54 Recross-examination by Mr. HALL:

Q. You have never tried to see, have you, when there is any current it is down-stream, isn't it?

A. Except when there is a heavy wind from the northwest, I think it is slightly down-stream.

Q. Do you remember any occasion that you ever noticed any current upstream anywhere near the bridge?

A. I cannot tell you any particular time at all.
Q. Do you now remember any such instance?
A. Not to know. No, I cannot call to recollection any such instance, but as I said before, that a heavy westerly wind sets the water back to the wash bank up above the spile bridge.
Q. Now, was you ever up there in a yawl or skiff, or in any way when you noticed that the wind set you upstream?
A. I have been there when the wind set me upstream all right enough.
Q. That is the wind on your sails, but did the current set you up?
A. I think it did.
Q. When?
A. I cannot tell you just when.
Q. What year?
A. I cannot tell you, sir.
Q. How many years ago?
A. I don't know; I would not say for certain how many years ago, but that is what I think.
Q. You are merely giving your opinion?
A. That is all there is to that part of it. I did not put a level on it to know whether it was straight up.

W. H. TALLMAN.

The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of C. W. Guy, the following:

C. W. Guy, of lawful age, being first duly sworn according to law, testified as follows, to wit:

55 Examination by Mr. Burton:

Q. You are a resident of Ashtabula?
A. Yes, sir.
Q. How long have you lived here?
A. Since '66.
Q. What is your occupation?
A. Draying; ice business at present.
Q. Have you had to do, since your residence in Ashtabula, with the ownership and management of tugs?
A. I used to own a little one.
Q. What was she called?
A. Iceberg.
Q. I will ask you to state whether on that tug or in connection with any other tug you have been above the spile bridge in the Ashtabula river?
A. Yes, sir.
Q. Please state when that was.
A. I think it was in June, two years ago last summer.
Q. What was the draft of that tug?
A. She drew somewhere in the neighborhood of five feet.

Q. From what points did you start and to what point did you go?

A. We left her dock by the Harmon milk shanty and our object in going up there was to try and find an excursion ground. The street railroad was torn up then and I didn't know but we might find a way to bring passengers; we got in pretty close to Eliza's island.

Q. Where is that milk shanty?

A. On Bridge street, at the west end of the bridge.

Q. And you went up quite close to Eliza's island?

A. Yes, sir.

Q. What was the depth of the water along the way?

A. I don't know; we had two poles, ten and twelve feet long, and went up slow because we was only prospecting anyway, and we had a pole on each side feeling our way along, and went along steady not to get on the ground.

Q. What was the depth of the water from the lower point
56 of the spile bridge up to the highest point which you went near Eliza's island?

A. I don't know how far it was.

Q. What was the depth of the water along there?

A. I don't know only from hearsay; up as far as the spile bridge it is quite deep and after we got above the spile bridge is when we took our precaution.

Q. What I asked was what was the depth from the lower side of the spile bridge up to Eliza's island where you went.

A. I cannot tell you the depth of water; we had a ten-foot pole and we did not strike bottom until we got pretty near the island.

Q. How frequently did you put down that ten-foot pole of which you have spoken?

Q. After we passed the spile bridge we had a man on each side of her; we kept reaching it out because we did not want to get ourselves fastened on the ground and not get off, but we did after all.

Q. State whether that pole touched bottom.

A. Not at first.

Q. How far did you go above the spile bridge before it touched the bottom?

A. I cannot tell you.

Q. Approximate it.

A. By the wash bank.

Q. Have you been familiar with the depth of the river there for a series of years, Captain?

A. Oh, I presume there has been seasons that I have not been up there, but I have been up there quite often.

Q. What would you say as to the comparative volume and depth of water during the time you have known that river, of the river and water above the bridge?

A. I don't know as they change very much and don't know but it does; it is a natural consequence that it would fill up and then ice would take it out again.

Q. What would cause it to fill up?

A. Roiley water.

Q. What determines the height of water where the spile bridge is?
A. I should judge the level of the lake.

57 Cross-examination by Mr. HALL:

Q. How high was the rail of your tug, Captain, above the water?
A. I think we only had a ten-inch rail from the deck up.
Q. How far would that be from the water?
A. Probably not more than two feet.
Q. Do you remember the names of the men who did the sounding with the poles?
A. No, I do not, but I have the names of both of them the first time we went up; they were both officers of the boat; I was no officer.
Q. Who were these officers?
A. I don't know.
Q. You made no soundings then, did you?
A. I was along with them.
Q. Did you do it yourself?
A. Yes, sir, I did it myself.
Q. These were the only occasions you went up;—I mean with the tug?
A. We was up two or three times to try and find a picnic ground up there and we was up in the fall, the latter part of August again to this creek near the Cook place. That time we went up they was all tug fellows.
Q. Were you on board?
A. Yes, sir.
Q. Who were they?
A. Jim Wilding, I don't remember the whole of them; Frank Ferguyson; I don't remember the rest of the names and who they were I can't be positive about, I know it was the fellows from the big tugs who borrowed mine to go up.
Q. Borrowed yours because it was a light draft?
A. I guess it was the only one that would go under the bridge, the only one that had a drop-stack.
Q. Do you know just what the draft of your tug was?
A. I don't know. I would not be positive, somewhere in the neighborhood of five feet. I would have to ask the man that built her.
Q. Who built her?
A. Laird & McClaren.

C. W. GUY.

58 The plaintiff, further to maintain the issue on his part, offered and read from the deposition of John Stearns, the following:

JOHN STEARNS, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. You are a resident of Ashtabula?
A. Yes, sir.
Q. How long have you been here?
A. Since '61.
Q. What is your occupation?
A. Carpenter and bridge-builder, etc., a general man.
Q. I will ask you to state whether you know the so-called spile bridge on the Jamestown branch of the Lake Shore road?
A. Yes, sir.
Q. Were you familiar with that bridge at the time it was built?
A. I worked on it when it was built.
Q. What was its first construction with reference to having a draw?
A. It had a jack-knife draw.
Q. In what year was it built?
A. The spring of '73, I think.
Q. Who was the general engineer in the building of the bridge?
A. Charles Langtry was foreman.
Q. Do you know who designed the bridge?
A. I think Mr. Hepburn.
Q. Was Hepburn present occasionally during the building?
A. Yes, sir, most every day.
Q. What is the length of that bridge, about, and what was its length when first constructed?
A. On the west side four bents and twice as many on the east side. They would be twelve feet apart, and then the swing.
Q. That would make about what length all included?
A. I should think about 250 feet, in the neighborhood of that.
59 Q. How was it supported at the two ends?
A. With piles.
Q. Do you know the depth of the water at that time?
A. I can't state that; probably ten or twelve feet, something like that.
Q. How was it as to being uniform in depth across there?
A. It varied some in depth.
Q. Where was this true, on the east or west side?
A. A little more on the west side.
Q. How many piles were put into the water in the construction of it?
A. Two abutments were put in, I have forgotten how many in each abutment, sixteen or eighteen piles in each abutment.
Q. How many abutments did you say?
A. Two.
Q. As constructed, is the present bridge the same thing as that?
A. No, sir.
Q. Are you familiar with the bridge as it now is?

A. I go over it occasionally.
Q. What are the superstructures of the bridge now?
A. On piles. The piles have been replaced.
Q. How many rows of piles are there in the superstructure now, Mr. Stearns?
A. I would say four supports.
Q. What is there with reference to its now being a draw?
A. It is not.
Q. Do you know when the draw was abandoned?
A. No, sir.
Q. Do you know where the bridge came from, the superstructure?
A. No, sir.
Q. Were you familiar with the depth of the water above and below the bridge?
A. No, sir.
Q. What kind of a draw was this called?
A. Jack-knife draw.
Q. Now the term of dead water is occasionally used; what do you mean by that?
A. Where there is no current.
Q. What is the nature of the current there at that bridge, if any?

Defendant objects.

60 A. In a freshet, of course, there is a big current; at other times there is none at all to speak of. There is a little, but not very much.
Q. Do you know how big a range there is in the level of the lake here through a year—how big a range is there between the highest and lowest points—high and low water?
A. I have known it to be two feet.
Q. Do you know how far this volume of water from the lake sets back above this bridge there?

Defendant objects.

A. Sets up to the riffles.
Q. Where are those riffles?
A. Just above Eliza's island.
Q. How far would this be above this pile bridge?
A. 1,000 feet or more.

Cross-examination by Mr. HALL:

Q. Your business was carpenter and bridge-building?
A. Yes, sir.
Q. How long did you work on the bridge?
A. From the time it was commenced until finished.
Q. What was the particular part of your business, your duty?
A. General carpenter at that time.
Q. You have had no special occasion to know the depth of the water?
A. Not particularly, any more than staging going across, seeing the piles put in. I never measured it.

Q. Nothing particular to direct your attention to that, was there?
A. Nothing more than that.
Q. You saw the piles put in?
A. Yes, sir.
Q. The piles were put in near the margin of the river?
A. At each end they were out in the river partly.
Q. How many feet would they extend from the margin to a point in the water?
A. I don't know.
Q. What do you remember?
A. It was quite a few bents in the water, the bents would
61 be twelve feet apart.
Q. What is your recollection now after twelve years?
A. The piles are there to show yet.
Q. Have you made any examination for the purpose of telling these facts during the last twenty years?
A. No more than passing back and forth over it occasionally.
Q. You have taken no more observation than anybody would take that was passing, have you?
A. Not particularly; no, sir.
Q. I think you said you never made any soundings across or measured the depth of the water?
A. No, sir.
Q. Have you made any experiments at any time, and if so, when, to ascertain and determine the depth of the water?
A. Nothing only that one time.
Q. Did you make any experiments at any time?
A. No, sir.
Q. When you speak of the level of the lake have you any information other than any one has?
A. No, sir.
Q. You have made no marks, have you?
A. I did today and different times when we were building the dock.
Q. When did you last examine to see?
A. I have seen it almost every day this winter.
Q. When did you last examine to see?
A. About half past eight or nine this morning.
Q. Does the height of the water differ every day?
A. Yes, sir.
Q. Some years the lake is a good deal higher than others?
A. Yes, sir.
Q. No regularity about that?
A. No, sir.
Q. When did you make any experiments to see how far the lake sets back?
A. Never.
Q. Is Mr. Langtry not living?
A. Yes, sir.
Q. Where is he?
A. On the west shore with Mr. Bebout, I think he is under him.

JOHN STEARNS.

62 The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of E. J. Willie, the following:

E. J. WILLIE, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. How long have you lived at Ashtabula?
A. Since '51.
Q. What is your present occupation?
A. Tug captain.
Q. How long have you been connected with tugs here in Ashtabula harbor?
A. Since '76.
Q. I will ask you to state if you are familiar with the channel in Ashtabula river.
A. Yes, sir.
Q. How long have you been familiar with it?
A. Since '76.
Q. I will ask you to state the general depth of the water from the lake line to the spile bridge of the Lake Shore Co. and above.

Defendant objects.

A. I would say the average depth of the water from the end of the pier to the head of the Lake Shore dock would go seventeen foot, and from there up probably—in '76 I was up there with a tug, a tug that drew eight feet of water and we were within 150 feet of the bridge. Since then I have not been up that far.
Q. You were not on that tug of Guy's?
A. No, sir, not that I remember of.
Q. Are you familiar with the depth of water above the Lake Shore pile bridge?
A. No, sir.
Q. In '76 you say you went within how great a distance of the pile bridge?
A. 150 feet, maybe a little closer.
Q. What were you on then?
63 A. I don't know whether it was the Dragon or the J. C. Ingram.
Q. What would be the draft of the tug?
A. Seven and a half or eight feet. The Ingram draws a trifle the most.
Q. How was the channel utilized, if at all, above the docks by the bridge?
A. At one time there was several vessels up there. The Star of Hope lay up there and water logged up there and then she was pumped out and sold to Cleveland parties.
Q. About when was that?
A. 1877.

Q. Do you know about what was the draft of the Star of Hope?
A. She was a canal schooner about five and a half feet.
Q. About what was her tonnage?
A. Three hundred gross ton.
Q. When loaded how much would she draw?
A. About eleven and a half feet of water.
Q. How long was she up there and how near to the bridge was she located?
A. Probably 200 feet of the bridge, just around the bend.
Q. Do you remember the names of any other boats moored up there?
A. The barge Hercules lay up there and went out the time we had this September freshet in '78. I don't remember what year it was.
Q. About what was her tonnage and draft?
A. She was an old lumber barge, three or four feet when light, loaded maybe seven or eight feet.
Q. About her tonnage, do you know about that?
A. I do not.
Q. Was she loaded or light up there?
A. There was some boat came in there and unloaded, loaded with posts or telegraph poles, I don't know which it was, and I don't whether it was her or not.
Q. Where did she unload?
A. Between the two tracks where they come in a V shape on the west bank.
Q. How far would that be below the bridge?
A. Fifty or seventy-five feet.
64 Q. Do you remember what year that was?
A. I don't know, for she lay there two or three seasons, and we went up once for her and took her with the tug to a colored picnic in August. I think that was in '76 or '77, I would not say for certain.
Q. Was there a lumber yard on either side of the river?
A. No, sir, there was no dock at all.
Q. Seymore & Giddings, where were they located?
A. I don't know. There was an old lumber yard on the Fields plat.
Q. Hitchcock & Prentice, where were they located?
A. I can't say.
Q. Did they unload lumber there occasionally, near the bridge?
A. I don't remember of being but that one load and that was poles.
Q. About what was the size of the boat that brought the poles?
A. I got it in my head it was that Hercules, but I am not sure.
Q. Have you been familiar with the depth above the bridge or at the bridge?
A. I never was above the bridge that I know of. I have been in swimming below the bridge, and there was some eight or ten feet of water.

Answer objected to.

Q. Did you ever go in swimming above the bridge?
A. No, sir.
Q. Did you go in swimming there after the bridge was put in?
A. I don't remember, I think not.
Q. Over how wide an area did that depth extend?
A. One-third the way across.
Q. What would be the distance across the river at that time?
A. Probably 100 feet, maybe 120 feet.
Q. What is it now?
A. I was up the time we had a freshet awhile ago and saw the Lake Shore Company had driven piles out in the water 10 or 12 feet, maybe it was high and made it look nearer the water.
65 I don't believe it is over 100 feet across.
Q. What is the direction of the current?

Defendant objects.

A. Take it in the middle of the summer, I should not say there was a bit of current. Then if the wind is in the northwest, it would set up the creek. As the water raises and falls in the lake it shoves the stuff up.
Q. How far up the river is that true?
A. I don't know, five hundred feet above the bridge, maybe a thousand.

Objected to by defendant.

Cross-examination by Mr. HALL:

Q. Have you ever made any measurement or observation for the purpose of determining with reference to the current above the bridge?
A. No, sir, not above the bridge.
Q. Did you ever make any measurement or sounding above or below the bridge above the docks?
A. Only that the tug needed that water. She would draw all that we could get up there, without fetching up on the bottom.
Q. You mean simply that you went where you have stated with your tug, and you estimated the depth of the water from what the tug drew?
A. Yes, sir.

Redirect examination by Mr. BURTON:

Q. How frequently did you go in swimming there?
A. It was just in the spring of the year when the water was warmer there than in the lake.
Q. How frequently did you go in there?
A. Three or four times in the spring, maybe two or three years.

E. J. WILLIE.

66 The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of John Castle, the following:

JOHN CASTLE, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. How long have you lived in Ashtabula?
A. Was born here.
Q. How old are you?
A. Forty-seven.
Q. What is your present occupation?
A. I am engineer of a tugboat.
Q. How long have you been so employed?
A. Since '67; that is the first summer I have had charge of one.
Q. Have you been continuously so employed since?
A. Yes, sir.
Q. Are you familiar with the Ashtabula river?
A. Since '75 I have been on a tugboat all the time.
Q. I will ask you to state the amount and volume of water from the lake up the river to the pile bridge of the Lake Shore road.
A. Oh, I can't say. When I first came here the iron-ore dock did not go any further than the Pennsylvania slip, at that time, there was nine or ten feet above there and the pile bridge. I was in a tug that drew seven feet, and I used to run up to the pile bridge and didn't have any trouble.
Q. What tug was that?
A. Dexter.
Q. What year was that, or what years?
A. I would not say I went up the first year, but I did the second year. I may have went up the first year.
Q. By the first year you mean '75?
A. Yes, sir.
Q. Do you know the depth of water above the pile bridge?
67 A. I never sounded it, but I used to fish up there, nine or feet.
Q. How far up above the pile bridge would that depth of water extend?
A. I should say clear to the wash bank.
Q. By the wash bank you mean that bank on the west side of the river?
A. Yes, sir.
Q. What means have you of knowing the depth above the pile bridge?
A. When I was a boy I used to fish down there with a seine.
Q. During what years did you fish there?
A. I cannot tell, almost any year—every year.
Q. Until about when?
A. Until '61. I went away from here in '61; I was away until '75.
Q. Is this depth of water continuous from the spile bridge to the wash bank, what are the facts as to its being continuous?

Defendant objects.

A. We used to pull a seine up along there and I never knew of any shoal place until we came to the wash bank.

Q. What would be the amount of water that would be required to float your seine?

A. Ten feet. The seine was ten feet wide, maybe it didn't take quite that amount. We could fish where there was eight feet; we applied it to the depth of water.

Q. Between what points did you draw that seine above the bridge?

A. From the bridge to Eliza's island.

Q. Above Eliza's island what is the width and depth of the river?

A. Some places it is not very wide, I should say it was not over sixty feet.

Q. How wide would it be in the narrowest place?

A. Thirty feet.

Q. Up to what point are you describing it now?

A. As far up the creek as you want to go; I am acquainted with this creek for ten or fifteen miles.

Q. Between Eliza's island and the Lake Shore bridge on
68 the main line, what is about the depth of the river?

A. There are places that are nine or ten feet, and there are places you can walk across in the summer time with your boots on.

Q. How deep would that be, the minimum depth?

A. I can't say; there are a good many ledges of rock in the summer where there is no water at all.

Q. How long are these ridges of rock, about?

A. I don't know, I should say not over 100 feet.

Q. How about the use made of the channel of the river below the pile bridge during the time that you have known of it since '75, what use, if any, for the purpose of navigation has been made of that part of the river from the pile bridge to the docks?

A. There was vessels laid up there.

Q. What size of vessels?

A. I should say full size canal vessels.

Q. About how many tons?

A. Five hundred or six hundred tons.

Q. Laid up, when do you mean, winter or summer?

A. Laid up in the winter. I think the Julia Williard was up there at the time of the freshet and went out, she was laid up besides the Hercules, I think.

Q. Have boats been moored there during the summer?

Defendant objects.

A. We took a vessel up there loaded with either telegraph poles or cedar posts once. I can't tell you what year it was. I can't tell which side of the creek we left her. We took her to the bend by the pile bridge.

Q. Was she unloaded there?

Defendant objects.

A. Yes, sir.

Q. You don't remember on which side of the river?

A. I can't say. I have an idea that it was on the Lake Shore side.

69 Answer objected to by defendant.

Q. Do you know anything about a lumber yard there owned by Hitchcock & Prentice?

A. Yes, sir.

Q. Where was that?

A. That was down about the upper end of the Lake Shore docks. The Lake Shore extended up 400 or 500 feet to where that lumber yard was.

Q. When was that lumber yard made there?

A. I can't say; it was there when I came here.

Q. How long was it maintained?

A. I guess they received lumber there three or four years after I came here.

Q. How was lumber brought?

A. By vessels.

Q. Were logs ever brought there in rafts?

A. Not since I have been here.

Q. What was the size of boats bringing lumber to Hitchcock & Prentice?

A. Generally would carry 5,000 feet.

Q. What would be about the draft of these boats?

Defendant objects.

A. Ten and one-half or eleven feet.

Defendant objects to answer.

Q. Do you remember of any cargo of lumber being unloaded from vessels on the westerly side of the river?

A. No, sir, I do not.

Q. Do you remember of this boat they took up with telegraph poles?

A. No, I do not remember.

Q. Have you, during the years you have been engaged on a tug, gone up to this pile bridge?

Defendant objects.

A. Yes, sir.

Q. How far up have you gone with your tug in the river?

A. We took Mr. Blakeslee, the photographer, to picture a vessel unloading at that lumber dock, and when he got a picture
70 we run the tug's nose into the bank and went upon the bluff to get a picture, and we all went with him, and when we came back the wind had blown her off the bank and floated her up to the spile bridge; she was in the middle of the creek and I had to take off my clothes and go after her.

Q. How near to the bridge was it you left her?

A. One hundred feet.

Q. Do you remember what year that was?
A. 1877.
Q. What was the draft of that tug?
A. She drew seven feet; a little more when coaled clear up.
Q. Then you swam out and got on board?
A. The wind blew her off the bank and she kind of floated up the creek in the middle, maybe she was twenty or thirty feet below the spile bridge.
Q. What is the fact as to the amount of water there at that time, the depth?

Defendant objects.

A. Ten or eleven feet, I should think.

Defendant objects.

Q. From there where did you go with her?
A. We got him aboard and took him down to the docks again by the bridge.
Q. How about the business in this port as determined by the entries and clearances of boats in 1892 as compared with 1875, when you began here?

Defendant objects.

A. I cannot tell you, there is a big difference there.
Q. What has been the general tendency in regard to the business from 1875 to 1892?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

71 A. I know the first summer I came here we did not receive in an eighth of what we do now probably. There was only a few boats running here then.
Q. What would be the number in 1892?

Defendant objects.

A. I should say twenty-five or thirty a day; no, not that many; I can't tell. I have seen forty or fifty vessels in here to a time, barges and all.

To which answer the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

Q. What was the first dock built on the river, of which you know?
A. Well, No. 5 on the Pennsylvania side was the first dock after I came here.
Q. When you came here was there any docks on the easterly side?
A. Yes, the Lake Shore had a short one east of the Pennsylvania slip.
Q. What was the length?
A. 350 feet, maybe.
Q. How frequently do you go up on that east side during the season of navigation?

A. Some days we go up there fifteen or twenty times a day.

Q. You are engaged as engineer of a tug during the season of navigation?

A. Yes, sir.

Q. Do you know as to ownership along the side, who owns these docks, the easterly and westerly side?

A. No, I don't know.

Q. What are the principal articles of merchandise that are brought to and taken from Ashtabula?

A. Iron ore, most of it, and coal taken away, a very little lumber comes here, four, five or six cargoes a season.

Q. What else is brought and taken away?

72 A. They have brought some pig iron and some railroad iron.

Q. Your business is that of towing boats that come in?

A. Yes, sir.

Q. How near do the docks of the Lake Shore and Pennsylvania Cos. respectively come to this pile bridge?

A. I should say 1,000 feet.

Q. Do they extend up to the same point, the two railroads?

A. Pretty near.

Q. Which extends up the farthest?

A. The Lake Shore, if anything.

Q. How far above the bridge does the dead water extend?

A. Up to the wash bank.

Cross-examination by Mr. HALL:

Q. When did you last draw a seine in the river above the bridge?

A. Well, it is—I would not say just how long—nine or ten years probably. There is a law to prohibit that now.

Q. Are you able to tell when it was that you last drew a seine there?

A. No, sir.

Q. Will you swear that you have done it within fifteen years?

A. I would not say I have in fifteen years. I have since 1875, though.

Q. Will you say you have in twenty years?

A. Yes, sir.

Q. When?

A. I know I have in the last twenty years.

Q. When?

A. I can't tell you just what year.

Q. Where did you draw it?

A. Just above the pile bridge to the next bend.

Q. Whereabouts above the pile bridge?

A. Maybe 1,000 feet. We always drew the seine on the west side of the creek.

Q. Where did you last draw the seine there?

A. Just above the pile bridge.

Q. How near to it?

A. Maybe fifty or sixty feet above that and from there up the creek 600 or 800 feet.

Q. Are you sure about that?

A. Yes, sir.

Q. Who was with you?

73 A. There was one man that owned the seine, Alfred Fobes, yardmaster in the Lake Shore yard.

Q. How long was your seine?

A. I should say six or eight rods; eight maybe.

Q. How wide was it?

A. About ten feet wide in the middle.

Q. Was it ten feet wide?

A. I should say it was ten feet; I should judge that it was ten feet.

Q. Do you now know that it was?

A. No, sir, I don't know only just what I have seen; I should say——

Q. Do you know it was ten feet?

A. I don't know, I never measured it.

Q. Did you ever measure the depth of the water?

A. No, sir.

Q. When did you first go up the creek with a tug beyond the pile bridge?

A. That bridge was there when I came here.

Q. Did you ever go above the bridge with any craft?

A. Only with a rowboat.

Q. Did you take soundings then?

A. No, sir.

Q. When was it that you went up towards the pile bridge with the tug Dexter?

A. I went there, it was not in '75, but it was within a year or two.

Q. What did you go for?

A. We took a vessel up there one time.

Q. Within a year or two after 1875?

A. Yes, sir. It may have been 1878, I can't tell what year. I should say it was not the first year I came here. I should say it was in 1878.

Q. In 1878 when you went up there and took a boat, what boat was it?

A. I don't remember her name.

Q. Where did you take it to?

A. To the bend by the pile bridge.

Q. What for?

A. To unload a load of cedar posts or telegraph poles.

Q. For whom?

A. I cannot tell you that.

Q. On which side of the creek was it?

A. I can't tell you on which side of the creek it was.

Q. Did you go around Plum point?

74 A. Yes, sir.

Q. Was there any docks on the east side except dock No. 1 at that time?

A. Yes, sir.

Q. Where?

A. Up about where the mouth of the Lake Shore slip is there was a coal dock.

Q. On the island?

A. No, sir.

Q. Any other docks on this side at that time?

A. No, sir, only this lumber dock of Prentice's.

Q. Where was this lumber dock?

A. It was up within three or four hundred feet, I guess, of the upper end of the Lake Shore docks; down about 400 feet probably from where their docks are now.

Q. What has become of that dock?

A. It is torn out of there.

Q. When?

A. I guess—I think it went out at the time of the freshet, or the most of it.

Q. What freshet?

A. In September, I don't remember how many years ago, twelve or fifteen years.

Q. You don't even know the date of the great flood, do you?

A. No, sir, I do not.

Q. When was it that the Julia Willard lay up there?

A. At the time of this flood.

Q. Where?

A. Up about, I should say, four or five hundred feet above the upper end of the Lake Shore docks now.

Q. How long had she been laying there?

A. I can't tell you how long. It seems to me there was one summer she was not fitted out at all, the summer of the freshet and winter.

Q. Did she lay there four or five years?

A. I can't say as to that.

Q. Was she not in fact a small craft that had for years been abandoned and lay up there abandoned where she remained until the flood came and carried her out?

A. I think she was abandoned at the time.

Q. Hadn't she been abandoned for at least five years?

A. No; I don't think so.

Q. Will you swear she was not?

75 A. I think she was made a pleasure boat and they used to tow her around with tugs, but I won't swear to it.

Q. What other boats were carried out the same time?

A. The Julia Willard and the Jessie went out.

Q. Was not the Jessie in the same fix?

A. No, sir, she was loaded with stone below the bridge.

Q. They were all below the bridge?

A. Not until the water carried them down there.

Q. Do you mean to say the Julia Willard lay above the pile bridge?

A. No, below the pile bridge.

Q. This old barge Hercules lay there, she had been abandoned for some years?

A. I cannot tell how long.

Q. Wasn't it a fact that these two boats were boats that had been abandoned for a number of years and that they were just laying up there stuck in the mud until they were carried out by the flood?

A. The Julia Willard, she could not have been abandoned.

Q. Wasn't she abandoned for four or five years?

A. She lay there; she was not put to any use.

Q. She was not alongside of any wharf?

A. No, sir, alongside this old barge.

Q. And both up there in the mud?

A. Yes, sir.

Q. What vessel did you ever know to be tied up there in the winter and then be fitted out in the spring?

A. I can't tell you any of their names. I don't remember of any laying up there.

Q. When was it you took this vessel up there loaded with cedar posts?

A. I should say it was about 1878.

Q. How long did she stay there?

A. I can't tell you; two or three days, maybe.

Q. This was at the Prentice dock?

A. It was clear up by the pile bridge. We took her up and shoved her around the bend.

Q. Did she tie up?

76 A. It seems to me their head line was run to the bridge.

Q. Will you swear it was?

A. No, sir; I am pretty sure it was.

Q. You remember, do you?

A. I don't know what else there was there to make fast to.

Q. And because you do not know what else there was there to make fast to you think it was tied to the bridge. Did you see the boat unload?

A. No, sir.

Q. Did you see them after they were unloaded?

A. I don't remember.

Q. Do you know where they were piled?

A. No, sir, I do not know on which side of the creek they were put on.

Q. Do you know how much water the tug Dexter drew?

A. I never measured her; I always understood——

The part of the answer, "I always understood," objected to by defendant's counsel.

Q. Do you know how much water she drew?

A. No, sir, I do not.

Q. You think there was good water all the way up to the mai line bridge of the railroad?

A. No, sir.

Q. What boat did you ever see above the pile bridge?

A. Nothing more than a skiff or rowboat.

Q. Was there anything to direct your attention to the preci place below the pile bridge where you went with the tug?

A. I think the time we was towing this vessel up there loade with poles, I think the Star of Hope lay there sunk; I know we g alongside of the vessel to stop her and was going to try and sho her up alongside, and we got stuck on the bottom; we had to g ahead of her again; the creek was not wide enough for us to tak the vessel alongside.

Q. The Star of Hope was another abandoned vessel?

A. She was sunk there when I came here.

77 Q. And remained there until the great flood?

A. No, sir.

Q. When was it she got out?

A. I can't tell you.

Q. How many years before the great flood did you miss her?

A. I can't tell you. I was on the tug that took her to Clevelan

Q. Can you tell about what year?

A. Three or four years after I came here, maybe five; it ma have been 1880.

Q. You came here when?

A. 1875.

Q. And she lay there then?

A. She lay there sunk when I came here.

Q. How long she had been there you don't know?

A. I don't know anything about it.

Q. And you say the river is from thirty to sixty feet wide abov Eliza's island; you mean that the low banks are that wide, don' you?

A. I should say it would average sixty feet.

Q. The low banks or the water?

A. The water.

Q. Don't you know that except in times of freshet above Eliza' island and where there is no dam that the stream is so low an small that in many places you can walk across it, and very ofte the stream is not two feet wide in places?

A. I have seen it lots of times when I could walk across it i places.

Q. Have you seen it when you can walk across it dry shod, step ping on the stones?

A. Yes, sir.

Q. And is not that the usual condition in the summer and dr times above Eliza's island?

A. In places, yes, sir.

Q. Is not this the fact, that between the occasional deep place and holes the condition of the stream above Eliza's island in th summer time is such that you can cross by stepping on the stones?

A. There are places.
Q. Are not these places very frequent?
A. Well, yes, sir, it is every once in a little ways but I don't
78 know how many places where these ripples are in the summer.
Q. But you can always walk across them and these ripples come every few rods?
A. I won't say how far apart they are but I have been across in three or four different places, probably.

Redirect examination by Mr. BURTON:

Q. How many of these places are there between Eliza's island and the Lake Shore bridge on the main line?
A. I don't pretend to say how many there are.
Q. About how many?
A. I should say a dozen.
Q. What is the distance from Eliza's island to the Lake Shore bridge?
A. Following the creek it would be very near a mile.
Q. You speak of the Jennie being laid above the bridge, do you mean the pile bridge?
A. No, the road bridge.
Q. You say the Star of Hope sank there by the pile bridge?
A. Yes, sir.
Q. How far away from the pile bridge was it?
A. 200 feet.
Q. Do you know what her draft was?
A. When loaded, eleven feet.
Q. You were on the tug that took her to Cleveland?
A. Yes, sir.
Q. You don't remember what year that was?
A. No, sir.
Q. It was before the great flood?
A. Yes, sir.
Q. How long had she been out there by the bridge?
A. I don't know, she was there when I came here.

JOHN L. CASTLE.

The plaintiff, further to maintain the issue on his part, offered and read in evidence from the deposition of A. S. Bowker, the following:

A. S. BOWKER, of lawful age, being first duly sworn according to law, testified as follows, to wit:

79 Q. Your residence is here in Ashtabula?
A. Yes, sir.
Q. How long have you lived here?
A. Fifty-five years.
Q. What is your occupation?
A. Carpenter and joiner and bridge-building.

Q. I will ask you to state whether you are familiar with the p bridge of the Lake Shore road, the one on the Jamestown branch

A. I know where it is.

Q. Have you recently made a diagram of that bridge?

A. Yes, sir.

Q. Is that it there (showing witness diagram)?

A. Yes, sir.

Said diagram is offered in evidence, attached hereto and mark "Exhibit A."

Q. Did you take these measurements here?

A. Yes, sir.

Q. Please explain this part appearing here marked "170 feet.

A. That is the bridge proper, a Howe truss.

Q. What is the superstructure?

A. Wood and iron, a Howe truss with wood approaches and ir verticals.

Q. The dotted line represents the line of the water?

A. Yes, sir; these vertical poles are piling and bents.

Q. Under the bridge and below the trestle what would be t width of the river at this point?

A. The sixty-five feet of trestle-work stands on the land.

Q. On which side of the bridge?

A. On the east side of the river.

Q. Didn't I understand you that the water extended up——

Defendant objects.

Q. What do I understand by this dotted line?

A. That is earth.

Q. Just below the sixty-five feet?

A. That is turf.

80 Q. That dotted line on the west side under the wor "seventy-two feet," what line is that?

A. There was water there yesterday when I was there. Th ground (indicating the east side) is rather higher on this side.

Q. Please mark with this pencil with an X the point reached b the water at the two sides of the river.

(Witness marks the points with an X.)

A. That runs the length of the trestle-work.

Q. On the west side?

A. Yes, sir.

Q. What is the number of the vertical sheets of piling he (pointing to map)? What is the term you apply to these?

A. (Indicating on diagram.) These are rows of piles; some them are bents.

Q. What is the difference between bents and piles?

A. A pile is driven into the ground and a bent is set on mu sills.

Q. Which are piles and which are bents? Designate them "B

(Witness marks "B" on diagram as requested.)

Q. And are the rest piles?
A. Yes, sir.
Q. What is about the size of these piles?
Defendant objects.
A. Average about one foot.
Q. After that take the transverse section; how many piles are there in these rows of piles across there (indicating on diagram)?
A. About four, I think.
Q. These measurements there between the piles and bents——
A. They are what we call scale measurements.
Q. Giving the measurements from the outside?
A. From centre to centre?
Q. I mean "11.6," and there on the other side "30"?
A. Yes, sir.
Q. Do you know the depth of the water there?
A. No, sir.
Q. Have you ever been familiar with it?
A. No, sir.
81 Q. What does the 216-ft. river mean there?
A. As it showed yesterday when I was there measuring up the bridge.
Q. How long have you been familiar with Ashtabula river?
A. I came here in '55 and lived on the bank near the foot of Main street.
Q. Have you known of the unloading of lumber on the banks of the river?
A. Yes, sir.
Q. How far up have you seen it unloaded?
A. They unloaded a cargo of lumber just below the elm tree; the tree has gone out now.
Q. Was it above or below the bridge?
A. Just below.
Q. When was that?
A. That must have been in '68 or '70, before the sash factory burned.
Q. Do you know to whom it was consigned?
A. I think to Seymore, Giddings & Co. I was working in the shop at the time.
Q. The factory was located uptown?
A. Yes, sir.
Q. Do you know how the lumber was carried from there to the factory?
A. Drawn by teams.
Q. Along the west side of the river?
A. The west side.
Q. What road at the flats coming uptown?
A. By the David Strong road right there this side of his house.
Q. Do you know of any other cargo-s being unloaded anywhere along the river?
A. Across the river at the lumber yard.

Q. Where was that?

A. That was Prentice's, just across the creek here just a li
below.

Q. Where with reference to the upper line of the Lake Sh
docks?

A. I cannot tell you how far they came. I have not been th
to notice.

Q. How long were these docks located there for the unload
of lumber?

A. It must have been 400 or 500 feet.

Q. For how long a time were they located there?

82 A. They used it for a lumber yard for two or three ye

Q. About when was that?

A. It was about two years after the factory burnt.

Q. When was it that the factory burnt according to your
recollection?

A. I think about '70 or '71.

Q. Was this lumber yard located there before or after the bu
ing of the bridge?

A. Before there was any bridge nor anything; there wa
swamp when I built the dock.

Q. You have given the size of that dock. Who built that do

A. I put the timbers on it; they had some one drive
piling.

Q. The length was 400 or 500 feet?

A. I should think it was.

Q. What was the size of the boats that came up to that dock?

A. I can't tell you.

Cross-examination by Mr. HALL:

Q. The dock you speak of is one that Prentice and some
had?

A. Yes, sir.

Q. That was on the east side of the river, and how far do
the river?

A. I can't tell. They used to come above where the Fie
brook came in before it was changed.

Q. That was where the Lake Shore docks are now, was it not?

A. I think so.

Q. Speaking of the lumber that was unloaded for Seymore &
that was near to the lumber yard?

A. Yes, sir.

Q. How far above, do you think?

A. It is right there on that bend.

Q. How far below the bridge would you think, as you n
remember?

A. It seems as though it could not have been but a few rods.

Q. Was that where the Pennsylvania Company afterwards bu
some docks?

A. No, sir; I don't think they have got any docks up th
now.

83 Q. You would not be certain of that?
A. No, sir.
Q. You do not think it was below where the bridge is?
A. Yes, sir.
Q. Did you ever know of any other lumber but that one cargo unloaded there for Seymore, Giddings & Co.?
A. No, sir.
Q. Or for anybody?
A. No, sir, not on that side.
Q. When did you make your measurements and examination for the purpose of drawing this plat?
A. Yesterday.
Q. The river was covered with ice, was it?
A. Yes, sir, with a jam of ice in above there.
Q. Then you are not able to state at what point the river line was by reason of the ice?
A. Not exactly. On the east side there is a sharp bend.
Q. You could not tell yesterday, could you, whether the ice on the west side had overflowed the natural river bank, or not?
A. Yes, it was all over the flats there for acres there. It could not go below the bridge very well and it had to stop somewhere.
Q. So that from the examination you made yesterday you are unable to state where the water would be with reference to the piling if there was no ice, are you?
A. I could not tell exactly where the stream would naturally run.
Q. But whether it would run through the south side up in among these trusses or not when the ice and everything was out, you don't know?
A. All under this bridge there is a lot of piling just below coming to the top of the water that have been chopped off or something and I don't know what they are there for.
Q. The river was covered with ice yesterday?
A. Yes, sir.
Q. This is not true under what is called the truss, is it?
A. Yes, sir.
Q. Which side?
A. All through almost anywhere there through the river,
84 all mixed up.
Q. Was it piled across the river?
A. Piled all through in the main stream under the 170-foot truss, the Howe truss.
Q. Was it piled across the river?
A. I cannot answer that, if it was piled across, of course there would not be piling straight across to make a perfect dam that is what I would call piling across the river.
Q. Was it piled across the river then straight or otherwise?
A. Not in there on a straight line but like a kind of a hatchel, as though you had been cutting down a big forest and the stumps were sticking up, that is the way it looked.
Q. Do you mean to tell us, Mr. Bowker, that piles were driven in the channel of the stream across the river?

A. Yes, sir, all these that are marked on the plat are drive the stream in the river and these others kind of stick up all a hilterskilter—been cut off.

Q. How thick was the ice yesterday?

A. I did not try it.

Q. Was it transparent?

A. I could see them sticking up through the ice.

Q. Where you have indicated on your plat you say there piles?

A. Yes, sir, piles and two bents.

Q. And you say that you saw through the ice?

A. Saw them sticking up just a trifle above the ice so that can see plenty of them in the water crossing there in the sum

Q. Then you mean to tell us, Mr. Bowker, that there was channel there?

A. Why, there is a channel in among the piling.

Q. Did you not say that the piling extended clear across the ri

A. No, sir; it did not extend clear across the river, only i scattered.

Q. Did you indicate on your map the correct location of the b and piles?

A. I think I have; they would not vary over a few inches.

85 Redirect examination by Mr. BURTON:

Q. About these piles in the channel, Mr. Bowker, do they constitute any part of the bridge?

Objected to by defendant as leading.

A. These that have been cut off do not, the others do, of cou

Q. How frequent are these in the channel as you cross on bridge?

A. I cannot say exactly. I saw a good many, though, yester along there. I could see them sticking up.

Q. Have you had to do with the construction of bridges at

A. Yes, sir.

Q. Have you seen any of these repairs made?

A. No, sir.

Q. What is the size of these that are cut off?

A. They all run 8, 10 or 12 inches.

Recross-examination:

Q. You were requested to go there and measure the bridge a make a diagram?

A. Yes, sir.

Q. And that was your business there?

A. Yes, sir.

Q. And that was what you directed your attention to and nothi else?

A. Yes, sir.

Redirect examination by Mr. BURTON:

Q. What are the facts of your seeing that bridge and crossing it at other times?

A. I have crossed it frequently in the summer time.

Recross-examination by Mr. HALL:

Q. Was your attention particularly directed to the bridge
86 and surroundings when you crossed it in the summer time?

A. Yes, sir; it was.

Q. When?

A. Every time I crossed the bridge, whenever I crossed it.

Q. When did you cross it the last time?

A. Yesterday.

Q. I mean in the summer time as you have stated?

A. A number of times last summer.

Q. When was the last time?

A. Last summer, I can't tell the time.

Q. You cannot tell any nearer than that?

A. No, sir.

Redirect examination by Mr. BURTON:

Q. You have built that kind of bridges?

A. Yes, sir.

Q. That is part of your business?

A. Yes, sir.

A. S. BOWKER.

The plaintiff, further to maintain the issues on his part, offered and read in evidence from the deposition of Capt. Perry White, the following:

Capt. PERRY WHITE, of lawful age, being first duly sworn according to law, testified as follows, to wit:

Examination by Mr. BURTON:

Q. You live here?

A. All my lifetime.

Q. Since what year?

A. 1828.

Q. What is your occupation?

A. Carpenter; ship carpenter.

Q. Where are you located now?

A. Living at the harbor.

Q. Where is your place of business?

A. I haven't any; my place of business is down around the creek all the time; I haven't any yard now I mean.

Q. During the time that you have lived here, have you been familiar with Ashtabula river, with the craft that float upon it and its size and depth?

A. Yes, sir, I have at times, but recently I have not had
87 much to do with it.

Q. I will ask you to state what you know as to boats of any kind going above and up to where now the pile bridge of the Lake Shore branch is located?

A. I have been up there with a scow that would draw three feet of water, but of others going up I can't tell you.

Q. When was that?

A. It would be about September, 1844.

Q. Where did you go?

A. We went up into the bend of the creek, near where the old mill used to stand, that would be a half a mile below the railroad bridge, at what we call Eliza's island.

Q. You mean the railroad bridge of the main line?

A. Yes, sir.

Q. Where was that mill located?

A. Well, there was no mill at that time; it was lumber we would haul there.

Q. Where was the bend to which you went with your scow?

A. Right abreast of the overhead bridge, or a little east of that the road across went right down to it nearly opposite where the power-house is now.

Q. How far below Mary-street bridge?

A. Now, I have not been down there since that bridge was built, probably in the neighborhood of a half a mile.

Q. Where was this place that you reached with your scow with reference to what you call the wash bank on the river?

A. That is still below. It was up to the bend about half way between there; sixty or seventy rods below this bank.

Q. I understood you to say you went above the wash bank?

A. Yes, sir.

Q. How far would you say you went above the wash bank?

A. Eighty rods, I should judge.

Q. What was the capacity of this scow; how much would it carry?

A. She would carry a load of lumber; she would carry 000 feet.

88 Q. How many times did you go up there?

A. I think we made four trips up there.

Q. Have you been familiar with that part of the river since then?

A. I have not, only to pass along.

Q. What was the depth of the water at that time up by the wash bank and below; you may state from the pile railroad bridge.

A. It would run; from under the bridge it would run from twelve feet as you rounded the curve until you got up abreast of that bank; I should know this because of the depth of the poles that we used.

Q. How did you get along with this scow?

A. We poled her up.

Q. When you got up to what is called Fisherman's point, about how deep would you say it was there?

A. The term is not familiar enough to me to locate it.

Q. Do you remember the location of the Scoville farm?

A. Yes, sir.

Q. Opposite that what would be the range in depth?

A. Over the lower part of it from eight to four feet, if I can locate the thing right.

Q. Right abreast of the high wash bank it would be about how deep?

A. Four feet.

Q. What is your judgment as to the amount of water running then as compared to now?

A. I have no means of knowing now; I know the water in the river fills and shifts about for the reason it fills in places and shifts it in other places; for this reason it is harder for me to state.

Defendant objects.

Q. What would you say of the volume of water in the river compared with then?

A. There can't be a terrible sight of difference; I don't know why there should be.

Q. How far up the river does the water back up from the lake?

89 A. Well, it must be pretty near two miles.

Q. You say two miles, up to what point would you say?

A. Right up to this island.

Q. What name do you give to that island?

A. The only name I ever heard was Eliza's island.

Cross-examination by Mr. HALL:

Q. In '44 or '45, in September, you went with a scow up to near where the old Smith mill was afterwards built; that old Smith mill was right at the foot of the road which turned in from Lake street very near where the railroad crosses now, was it not?

A. Yes, sir.

Q. And that mill was right at the bottom of that road?

A. Yes, sir; you would go up a little above.

Q. Now you speak of four trips; they were in the month of September, all of them, were they?

A. I think they were.

Q. Your attention has not been directed especially to the condition of the stream above where the docks are since that time?

A. Not in regard to the depth of the water.

Q. Have you observed this, Captain, that years ago, before the country was cleared up, so much water found its way more gradually into the stream, and they kept more uniform than now?

A. I don't know as it does a great deal.

Q. And it is only of late years that we have had the great floods, and during the dry season there has been much less water in the river?

A. It may be where the river is low, but as far as the lake is concerned, that would set up back there.

Q. Is it not true that since the country has been cleared up
90 the stream above where the lake effects it has been made dryer and the floods have been much greater?

A. I don't know, but it might be in a measure. I never have taken any particular thought of it.

Q. Now, going back to the other proposition, did you ever take pains to observe just how far the water in the lake sets upstream?

A. Now, I know it run clear up to the head of dead water.

Q. Did you take pains to ascertain?

A. I never seen that.

Q. Did you pay any especial attention to it?

A. No, sir.

Q. But at some time you think that you have noticed that the lake set back to Eliza's island?

A. Oh, yes, it certainly must.

Q. Then you say that because you reason that it must be so?

A. Yes, sir.

Q. That is why you made the statement that you did?

A. No, sir, I mean that I know it to be so on other rivers besides the Ashtabula.

Q. And it is from your knowledge of other rivers and your reasons that you make the statement you make on that point?

A. I do.

Redirect examination by Mr. BURTON:

Q. You say that it is the knowledge of other rivers; what river do you know most?

Q. I can tell you one, that is the Portage river.

Q. Where is that?

A. That runs from Port Clinton back in the country.

Q. How would your knowledge of that river compare with the Ashtabula river?

A. It is about the same.

Q. Which have you seen the oftener?

A. I have seen this oftener; I have navigated on that river?

Q. Have you seen this dead water up by Eliza's island?

Defendant objects.

91 A. I presume I have, but I can't swear that I have.

Q. How frequently have you seen this dead water from the lake up above the bridge?

A. There is seasons five or six times in a year when the water is up five or six inches.

Q. Have you observed that often?

A. Indeed I have not. I have not been there lately.

Q. What was the direction of the current?

A. There is no current in the summer time.

Q. What is the reason of that?

A. There is not current enough above to drive it down, I suppose. There is a very small current going out all the time, but it is not noticeable.

Q. This Smith's mill, was there any current from that down to the lake?

A. There was just below the mill just a few rods.

Q. Was there any current from the lake up to that?

A. There may have been, but not to my knowledge.

Q. When was this Smith mill built?

A. I can't tell you. It was before my time, I think.

Q. Until when did it stay there?

A. I don't know that I ever saw the mill running, but the mill was standing; the old mill was standing at this time.

Q. So it is not the place that you got your staves; you only identify the locality by that?

A. Yes, sir.

Cross-examination by Mr. HALL:

Q. That would bring you very close to where the railroad now runs down across Lake street?

A. Where the branch comes down.

Q. Where did the road that went down Smith's mill pass with reference to the house now standing on Lake street at the top of the railroad cut?

92 A. Well, I can't recollect it particularly; it went there by this house and then down easterly to the place where we loaded the staves.

Redirect examination by Mr. BURTON:

Q. On the river itself, where was that place that you loaded the staves?

A. Well, it was right back just below this old mill.

Q. It was up on the island, was it?

A. It might have been five or ten rods from the lower end of the island, right along the bank.

Q. Which way do you mean from the island, south or north?

A. From the lower end of the island, east.

Q. You were above the lower end of the island?

A. Yes, sir.

Q. About how far?

A. Five or six rods.

Q. Then you mean upstream from the island?

A. Upstream.

Q. On the easterly or westerly side of the island?

A. On the south side of the island.

Recross examination by Mr. HALL:

Q. You mean on the side next to the high bank?

A. Next to the high bank.

PERRY WHITE.

The plaintiff, further to maintain the issue on his part, offered and read in evidence the following:

The following are the number of vessels arriving at and departing from the port of Ashtabula during the years 1890, 1891 and 1892:

Year.	Arriving.		Departing.	
	No. of vessels.	Tonnage.	No. of vessels.	Tonnage.
1890	1,392	1,483,287	1,525	1,459,009
1891	1,046	1,176,909	1,008	1,167,453
1892	1,603	1,800,433	1,561	1,779,716

93 The following number of gross tons of iron ore arrived at Ashtabula during the years 1890, 1891 and 1892:

Year.	Gross tons of iron ore.
1890	2,182,626
1891	1,526,199
1892	2,596,806

I hereby certify that the above is a correct transcript of the records in the office of the collector of customs at Cleveland, Ohio.

GEORGE A. McKAY,
Deputy Collector and Marine Clerk.

Custom-house, Cleveland, Ohio, March 2d, 1893.

The plaintiff, further to maintain the issue on his part, called H. L. MORRISON as a witness, who being sworn, testified as follows:

By Mr. BURTON:

Q. Where do you reside?
A. Ashtabula; have lived there something over fifty years.
Q. Are you familiar with the Ashtabula river?
A. Tolerably so; yes, sir.
Q. For how long a time have you been so familiar?
A. During all the time of my residence there I have known more or less of it.
Q. Are you familiar with the business of the port?
A. Yes, sir.
Q. I will ask you to state if you have ever been on board of boat or known of a boat coming up the river to a point above the so-called spile bridge of the Lake Shore road?
A. Yes, sir, I have.
Q. When was that?
A. In 1870 or 1871.
94 Q. What was about the size of the boat, and what was it?
A. It was a tugboat employed about that time by Contractor Dodge. It was taking a party of us up the river.

Q. How far up did you go?

A. We went several hundred feet, I could not say how many, beyond where the spile bridge now is.

Q. What will you say was the depth of the water at the spile bridge and above there?

A. It was sounded a long time and we found it all the way from seven to ten and twelve feet.

Q. What season of the year was it?

A. I am not able to tell exactly, only it was in the summer time, I think after July or August.

Q. What was the condition of the water at that time?

A. Perhaps as low as at any season of the year.

Q. Were there other times you were up there?

A. Well, I have not been there in a boat except that time.

Q. What is the fact as to the depth of the water at that time as compared to the last two years.

A. I could hardly answer that question. The depth of the water is not very materially changed there from year to year, and one year to another.

Q. You are familiar with the business of the port of Ashtabula?

A. Somewhat, yes, sir.

Q. What are the principal articles of merchandise brought in and taken out?

A. The principal article is ore, and some lumber, shingles, salt and perhaps some other articles; the large majority consists of ore.

Q. What would be the next item to ore?

A. Lumber.

Q. What articles of merchandise were sent out from the port?

A. The principal one is coal.

Q. What is the condition of that trade, shipments of coal, as to increasing or decreasing?

95 A. Increasing every year.

Q. What would you say as to the capability of this land above the spile bridge for use as docks for loading and unloading coal and such articles of merchandise as are brought in or sent out from the port?

Objected to. Objection sustained.

Q. As to the lay of the land, what would you say as to its capability?

A. I think it is just as capable.

The COURT: As to whether the banks project right up to the water.

Q. What is the elevation of the banks—and the land—above the water?

A. Well, perhaps, three to five feet.

Q. How does it compare with where the docks are now located?

Objected to. Objection sustained.

Q. What was the elevation of the land where the docks now are before the construction of the docks?

A. Well, it varied from swamp to three or four feet above the level of the water in the river.

Q. What is the ownership of the land below this spile bridge; on the east and west side, respectively?

To which question the defendant objected; the court overruled the objection, to which ruling of the court the defendant excepted.

A. On the east side it is owned by the Lake Shore railroad, and on the west side by the P. Y. & A.

Q. Which stands for what?

A. The Pittsburg, Youngstown & Ashtabula.

Q. The Lake Shore is on the easterly side, is it not?

A. Yes, sir.

Q. Do they own the lands above the bridge?

96 To which question the defendant objected; the court overruled the objection, to which ruling of the court the defendant excepted.

A. Yes, sir.

Q. For how great a distance?

A. I do not know the distance; I could not tell.

Q. Approximately?

A. Hardly approximately, for I really do not know where the line is there; further than I know they own land above the bridge on the east side.

Q. How about the Pennsylvania side; how far up do they, if at all, own land?

To which question the defendant objected; the court overruled the objection, to which ruling of the court the defendant excepted.

A. Well, I could hardly say; perhaps 500 feet to 700 feet, I should judge.

Q. How about the occupancy of the land bordering on the river from the upper point of the Lake Shore docks to the mouth of the river?

Objected to.

The COURT: The objection goes to the materiality of the testimony.

Judge DICKEY: Yes.

Objection overruled; defendant excepts.

A. Well, the land has been utilized by dredging out the channel, also by dredging slips and docking.

Q. What share of the land below the bridge, near the bridge, that is, the land bordering on the river, is occupied now by docks?

A. It would be a matter of opinion; I do not know the exact distance, but I should say three-quarters of it.

Q. About what are these docks—most of them are adapted
97 to the unloading of freight?

A. Well, they are well adapted for unloading ore and coal, built expressly for that purpose.

Q. Are there any docks below this spile bridge suitable in size and facilities for unloading lumber?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. There are some, a small lumber dock on the east side, below the Lake Shore ownership; that is, on the river.

Q. Is there any other dock besides that?

A. There is one small dock below the swing bridge that is occupied, I think, for unloading lumber.

Q. How great is the width of those docks, that is, I mean their frontage on the river?

A. I think the lower one cannot be over 100 feet, still it is a matter of guess-work, an estimate. The one above is perhaps 200 feet.

Q. Are there any docks there that are furnished with machinery or otherwise adapted for the unloading of salt?

A. Well, not particularly that I know of.

Q. Any for lime?

A. Not for lime; there are docks owned by individual parties where such things are handled from the dock, but handled in the ordinary way; no particular machinery.

Q. What is the fact as to the machinery on these docks where ore is handled?

A. Well, it is handled by what are termed the Brown hoist and McMyler's, a variety; I can hardly name them, and by cranes; they handle ore particularly very rapidly on both sides of the river.

Q. Are there any ore docks not furnished with those hoisting machines?

98 A. There are some, I think, although they have been furnishing them as fast as they have been needed in the business.

Q. What is the truth as to the use made of those docks back behind the hoist?

A. Well, the ore is run back on some of them quite a distance, several hundred feet, 300 or 400 feet, that is in machines, so it can be carried along and dropped into the cars and taken away.

Q. What is the fact as to those docks being used for the storage of ore?

A. They are used for that purpose, largely.

Q. Are they used for any other purpose?

A. No other purpose that I am aware of, sir.

Q. What is the fact as to the quantity of ore stored on those docks?

A. Well, just along the docks particularly I do not know that I could give much of an estimate. Where they handle them with cranes they are stored almost immediately on the docks where they

are handled, with the hoist a great deal of ore is taken away and stored in other places, taken up and down the dock. They have a high trestle dock there, particularly the Lake Shore.

Q. That is the Lake Shore, West Ashtabula, is it—that is, these you refer to, during how many months of the year is ore brought into the port of Ashtabula?

A. It usually commences about the 1st of May, about from the 1st to the 15th of May, and lasts as long as navigation lasts.

Q. Until about what time?

A. About some time in the middle or latter part of November.

Q. And who has taken away all that ore, and as to the season when it is taken away?

A. As much of it as can be taken forward is sent forward in the summer, and ore is taken away in the winter. There was not any other business for the railroads.

99 Q. What do you say is the number of cars of ore taken away from that port every day; first I will ask you, during the summer season, the season of navigation?

A. It varies from day to day according as there are orders for ore. Some days they will get out 200 or 300 cars, and I have known them to send out as high as 500 on both sides.

Q. It varies along there?

A. Yes, sir.

Q. In the winter season how much is taken away, about?

A. Well, it varies in the winter season depending on the weather, on the demand for ore, the orders for it that they have; sometimes upon whether they can get cars or not.

Q. What would be about the range in the winter season?

A. Well, they would range probably on both sides from 100 to 200 cars, perhaps 250 a day, perhaps some days more and some less.

Q. What is the number of tons carried in each car, about?

A. They would vary according to the car from fifteen to thirty tons.

Q. What was the size of boats coming into the harbor twenty years ago?

A. They were small compared with those coming there now.

Q. About what tonnage?

A. Oh, a boat then that carried two or three hundred tons was considered quite a craft.

Q. What would be the draft?

A. From perhaps four to seven or eight feet.

Q. Are some of these boats still in use?

A. Some of them may be engaged in the lumber business, something of that sort, but none, I think, are engaged in carrying ore; the ore-carriers are larger boats.

Q. Are you familiar enough with the arrangement of vessels to state whether a boat of the ordinary size, and used on the lakes, could go around that bend there below the bridge?

100 A. No, sir, I am not; but I don't think those long, large boats coming there, could come around the bridge as it now is.

Q. As to the small craft?

A. The small craft perhaps could; of course, I can hardly tell; but I should say that a boat 100 or 150 feet in length might get around there.

Q. How about the width of that portion there in the yard below the bridge—is it uniform from time to time?

A. I believe the intention has been to make it of about a uniform width all the way down, as they have dredged it. They have widened it somewhat and changed the channel.

Q. Is it not true that there has been a great deal of slag, refuse, dumped into the river on the west side, within the last two or three years, just at the bend?

A. Yes, sir, there has been quite a considerable dumped in. The current coming down and going around the bend has a constant tendency to cut in on that side. The slag has been dumped in to prevent its cutting in any further, the tendency being all the while to cut in and make the bend sharper.

Q. What is the size of the largest carriers coming in the port of Ashtabula?

A. Do you mean the actual tonnage?

Q. The tonnage I will ask first.

A. Well, they range from 2,000 to 2,500, 2,700 and 2,800 tons.

Q. Is that the gross or net cargo?

A. I do not know as I can determine that question. I go largely by the reports of the vessels.

Q. How is the ore carried, by the gross or net tonnage?

A. That I could not tell you.

Q. What is the length of those largest boats?

A. Three hundred feet or thereabouts.

Q. Those are all propelled by steam?

A. Nearly all by steam, a few sail vessels, that is, they carry a certain amount of sail vessels, mostly tows, called barges.

101 Cross-examination by Judge DICKEY:

Q. You spoke of the principal trade that is shipped from there, that I understood you is coal?

A. Mostly, yes, sir.

Q. And does that coal come there by wagons or by rail?

A. By rail.

Q. What is the nearest point there that you know of where coal is mined?

A. I do not know that I can give you the exact distance; it comes in there from out in Pennsylvania; I don't know the distance to the mines there. It comes in over what is called the J. & P. road, and also up from Pittsburgh. A large amount of coal comes from the neighborhood of Pittsburgh.

Q. Well, all the coal that is shipped from there is brought in by rail?

A. All of it, yes, sir.

Further to maintain the issue on the part of the plaintiff, R. C. HUMPHREY was produced as a witness, who being sworn, testified as follows:

By Mr. BURTON:

Q. How long have you lived in Ashtabula?
A. Forty-two years.
Q. Are you familiar with the river?
A. Yes, sir.
Q. Will you identify Plum point and explain where it is?
A. Plum point is above the swing bridge, about 800 feet, just below the Lake Shore office. It is not there now; it is cut away now; it used to be there.
Q. There is not a vestige of Plum point there now at all?
A. No, not now.

By Judge DICKEY:

Q. How far is it below the bridge in controversy?
A. It is as much as 3,000 feet.

102 By Mr. BURTON:

Q. How far do you say it is above the other bridge?

A. Eight hundred feet.

By the COURT:

Q. That was on the east side?
A. That was on the west side. Plum point belonged to the west side, to the Pennsylvania Company.

By Mr. BURTON:

Q. The stone pier, where is that?
A. The stone pier is right opposite on the east side of the river bank where Plum point used to be.
Q. And that still stands there, the stone pier?
A. Yes, sir, the R. R. Co. built a stone dock there to protect the railroad tracks.
Q. The limekiln spoken of, where is that?
A. Just below that stone dock.
Q. With reference to the office of the Lake Shore?
A. Just above it, south of it; above the stone dock and south of it.
Q. On which side?
A. On the east side.
Q. It is the office of the Lake Shore railroad, is it not?
A. Yes, sir.
Q. The round-house, where is that located?
A. The round-house belongs to the Pennsylvania Company, located on the west side of the river, pretty well up to this spile bridge.
Q. Where is it with reference to the upper point of the docks?

A. Well, right opposite to the upper point of the docks, right west of it, crossing the tracks.

Q. Fields' run, where is that?

A. Fields' run now is above the bridge, but the Field run you speak of, they moved it; it used to run down through Fields' farm to the river below this spile bridge.

103 By the COURT (Judge CALDWELL):

Q. I think I can get those locations a good deal better by something that has not been spoken of here. The Pennsylvania Company has an elevated track running down there, from which they drop ore. Where is that with reference to the——

A. Well, that is on the west side of the river, just opposite this spile bridge where the trestles are right below it and south of it both. Fields' run is on the opposite side of the river.

Q. Fields' run you say is on the east side; it comes in from the east side?

A. Yes, sir.

By Mr. BURTON:

Q. This elevated track, I understand you, is for the dropping of ore?

A. Yes, sir; they call them iron-ore trestles. They load the ore from the cars and take it back by running out on those trestles and dumping it.

Q. To be reloaded?

A. To be reloaded.

Q. That is for the sake of having more storage room?

A. More storage room.

Q. Willow point, where is that?

A. Willow point was on Fields' farm below this spile bridge; the present spile bridge. It has a dock there now; it is covered with docks.

Q. Which side, east or west?

A. East side.

Q. How far is that below the upper point of the docks—how far was it?

A. 500 to 600 feet.

Q. Fisherman's point, where is that?

A. That is about 700 feet above the present spile bridge on the west side.

Q. How far does the line of the Lake Shore Co.'s land lie above the spile bridge on the east side?

104 To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. 500 feet.

Q. Above that is what was formerly known as Fields' farm, which you now own?

Objected to by defendant on the ground of immateriality only; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Yes, sir.

Q. On the west side how far does the occupancy of the Pennsylvania Company, or the A. Y. & P., extend above the spile bridge?

A. 1,600 feet.

By the COURT:

Q. Then does your farm come in above the occupation of the Lake Shore, above the bridge?

A. Yes, sir, on the east side.

By Mr. BURTON:

Q. You have been in business at the harbor, have you not?

A. Yes, sir.

Q. I will ask you to state whether you are familiar with the shipping used there, their boats, etc.?

A. Yes, sir.

Q. What is the draft of the boats?

A. Oh, from four to eighteen feet.

Q. What can you say as to boats going above that bend in the river just below the bridge?

A. We have had boats above the bend in the river, that we owned.

Q. By "we," whom do you mean?

A. My father.

Q. What were some of them?

A. Star of Hope.

Q. How large a boat is that?

A. Carried 400 tons.

Q. What was her draft?

A. Loaded, eleven feet.

Q. What was her length about?

A. One hundred and fifty feet.

105 Q. What can you say as to the width of the river there at that bend now as compared with the time when those measurements were taken in March?

A. It is wider.

Q. What change, if any, has taken place?

A. Cinders have been washed out from the west side of the river.

Q. By what?

A. Freshet.

Q. This recent freshet you refer to, within a week or two?

A. Yes, sir.

Q. What has been going on, on that west side there, at the point or bend, the last two or three years?

A. It has been filling it up.

Judge DICKEY: Note an objection to that.

Mr. BURTON: I will withdraw that.

Q. What size of boats would go under the bridge there; what would be the height of these boats, such as the Star of Hope, or other of those smaller craft?

A. You mean the height, masts and all?

Q. The height above the water; yes, masts and all?

A. Why, it would be 150 feet.

Q. Could any boat of any considerable size go under that bridge?

A. No.

Q. Are you familiar with the depth of the water above the bridge?

A. I am for 800 feet above.

Q Have you measured that?

A. Yes, sir.

Q. When did you take the measurements?

A. I took measurements this spring.

Q. What was the measurements?

A. Well, I found nothing less than seven feet—from twelve to seven feet.

Q. That was going from the bridge up?

A. 800 feet.

By the COURT:

Q. What was the stage of the water compared with the harbor?

A. Why ordinary.

106 Q. Was it above or below; how much above, did you notice?

A. I suppose the water was low; this year and last year we have had a low stage of water.

By Mr. BURTON:

Q. Did you see this witness that testified on the stand here this morning, when he was taking measurements?

A. Yes, sir.

Q. What was the condition of things there?

A. There was ice in the river and it was hard to get any measurements there at all.

Q. Why hard?

A. Why, it was full of rough ice, banked up there.

Q. Did you see them for any considerable time while they were at work?

A. Well, a couple of days.

Q. Did you know who were with him at the time there?

A. Well, I knew one of the men, Harpst.

Q. Have you taken any measurements from this 800 feet above up to what is called the wash bank?

A. No, I have not.

Q. Do you know the depth of the water there in any way?

A. No, I could not state.

Q. Have you been over that with a boat?

A. Oh, lots of times.

Q. A boat of any size?

A. Only a small boat.

Objected to by defendant on the ground of immateriality only; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Yes, sir.

Q. On the west side how far does the occupancy of the Pennsylvania Company, or the A. Y. & P., extend above the spile bridge?

A. 1,600 feet.

By the COURT:

Q. Then does your farm come in above the occupation of the Lake Shore, above the bridge?

A. Yes, sir, on the east side.

By Mr. BURTON:

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A. Yes, sir.

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A. We have had boats above the bend in the river, that we owned.

Q. By "we," whom do you mean?

A. My father.

Q. What were some of them?

A. Star of Hope.

Q. How large a boat is that?

A. Carried 400 tons.

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A. You mean the height, masts and all?

Q. The height above the water; yes, masts and all?

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A. I suppose the water was low; this year and last year we have had a low stage of water.

By Mr. BURTON:

Q. Did you see this witness that testified on the stand here this morning, when he was taking measurements?

A. Yes, sir.

Q. What was the condition of things there?

A. There was ice in the river and it was hard to get any measurements there at all.

Q. Why hard?

A. Why, it was full of rough ice, banked up there.

Q. Did you see them for any considerable time while they were at work?

A. Well, a couple of days.

Q. Did you know who were with him at the time there?

A. Well, I knew one of the men, Harpst.

Q. Have you taken any measurements from this 800 feet above up to what is called the wash bank?

A. No, I have not.

Q. Do you know the depth of the water there in any way?

A. No, I could not state.

Q. Have you been over that with a boat?

A. Oh, lots of times.

Q. A boat of any size?

A. Only a small boat.

Q. What was the condition of business there, the amount of traffic in the harbor in 1892, as compared with the time you first knew it?

To which question the defendant objected; the court overruled the objection; to which ruling of the court the defendant excepted.

A. Why, there is a very large business there now, and but a small business when I first knew it.

107 Cross-examination by Judge DICKEY:

Q. You are the party who commenced this proceeding, and whose name is mentioned in the papers in connection with the State as plaintiff here, are you not?

A. Yes, sir.

Q. When you were measuring 800 feet above the bridge you were looking for the most shallow place, I suppose, were you not?

A. I was looking for good water.

Q. You were not hunting the most shallow places then?

A. No.

Q. You speak of being up there with the Star of Hope, and when she was loaded her draft was about eleven feet, I think you say?

A. Yes, sir.

Q. How high did you go up with her?

A. Within 100 feet of the bridge.

Q. Was she loaded when you went up there?

A. No, light.

Q. What was her draft as she was?

A. Well, she sank there in the river, went clear down decks to——

Q. But what was her draft empty?

A. About three feet and a half.

Q. How much lumber do you say she had with her?

A. She wasn't loaded.

Q. You think she went within about a hundred feet of the bridge?

A. Yes, sir, right above the bend.

Redirect examination:

Q. How wide a space did you go in taking these measurements of 800 feet?

A. Forty feet.

Q. Side by side?

A. Yes, sir.

Q. What were you in, a rowboat, or what?

A. A rowboat.

By Judge DICKEY:

Q. That is, you made measurements at forty feet as you were going across?

108 A. We took the centres and went twenty feet on each side.

Q. How many measurements did you make across, do you know?

A. Oh, we measured every one hundred feet.

Q. In making forty you made three measurements?
A. Yes, sir.
Q. In the centre and twenty feet on each side?
A. Yes, sir.

By Mr. BURTON:

Q. Do you know other boats going above there?
A. Yes, sir.
Q. What other boat?
A. The Volunteer.
Q. What was her size?
A. She was about 300 tons.
Q. When was she up there?
A. The same time.
Q. About what year was that?
A. 1876.
Q. Do you think of any other boats?
A. The Hercules.
Q. When was that?
A. Well, about the same time.
Q. What was her size?
A. I cannot give you her size.
Q. Do you think of any others?
A. Well, the Julia Willard.
Q. About what was her size?
A. She was, I think, about 400 tons.
Q. What is the condition up above that bridge now as compared with what it was formerly; I mean with reference to the existence of bars in that river?
A. A bar has formed since the bridge was built.
Q. Where is the bar?
A. The bar is about 600 feet above the bridge.
Q. How far does it extend?
A. As much as 400 feet that I can see of it.
Q. What is the width of the bar?
A. I could not give the width.
Q. Is it near the westerly or the easterly side of the river?
A. West side.
Q. How long ago did you first notice that bar?
A. Four years ago.
Q. Before the bridge was there, was there such a bar there?
A. None.

109 Q. Are you able, from your own knowledge, to compare the depth of the water at or immediately above the bridge, with what it was before the bridge was there?
A. No, sir.
Q. I will ask you to state whether any business enterprises, depending upon docks above that bridge, have been prevented by the location of that bridge?

Objected to.

Q. What, if anything, in the way of a factory or other thing, i located at or near the river above that spile bridge?

To which question the defendant objected; the court overrule the objection; to which ruling of the court the defendant excepted

A. A planing mill.
Q. Where is that located?
A. It is on the Fields farm.
Q. How far above the bridge, about?
A. It is off to the side of the river; it is not quite on the river it is just about a couple of hundred feet above the bridge; the mil companies land comes to a point up above the bridge.
Q. From where is the lumber brought to the planing mill?
A. Brought from the river below, from a dock down at the har bor; brought down by wagons.
Q. I will ask you to state what demand, if any, there has beer for docks up above that bridge for any purpose for the last two o three years?

To which question the defendant objected, the court overruled the objection, to which ruling of the court the defendant excepted

A. Well, there is a demand. I have had parties wanting to lo cate there.
Q. For what?

110 To which question the defendant objected; the court over- ruled the objection, to which ruling of the court the defend- ant excepted.

A. For the handling of lumber and building of steam pumps and for founderies and other things connected with manufacturing enterprises.

By Judge DICKEY:

Q. Do you know what the greatest open space under that bridge is in the river?
A. Twelve feet from the water up to the bridge.
Q. I was not speaking about the height, but in breadth.
A. No, I do not.
Q. What do you understand to be the widest space of clear water under that bridge; I do not mean the height of the bridge, but I mean spaces between the piling?
A. I think there might be fifteen feet there.
Q. Ain't there more than that; ain't there thirty feet?
A. No, sir, I would not think so. They had spiles there to con- struct the whole bridge on, and they cut those spiles off down to the water's edge, and they are there in the river yet.
Q. Do they extend clear across the river?
A. Yes, sir, most of the way across.

By Mr. BURTON:

Q. What is about the height of the smokestacks of the tugs ordinarily that are used on the river there?

A. I should say twenty feet.

By Judge DICKEY:

Q. Did you ever measure the height of the stack?

A. I never have.

111 Q. All you know is from seeing them move around?

A. Yes, sir.

Q. You speak about some vessels going up there. When did the Star of Hope go up there?

A. 1876.

Q. She staid there a good while when she got there, didn't she?

A. She staid there all winter.

Q. She was aground there, was she not?

A. Yes, sir, she sank right there.

Q. How was it in regard to the Hercules; didn't she sink up there?

A. Yes, sir, she was taken up there.

Q. And she sank there?

A. She sank there, yes, sir.

Q. How long did she stay there?

A. She went out in the freshet of 1878.

Q. And went up there in 1876?

A. In 1876, yes, sir.

Q. How was it about the Volunteer; how long did she stay?

A. Well, she stayed until the next summer, of 1876.

Q. Boats that got up that far generally stayed some time?

A. It was in a dull time, you know.

Q. She was aground too, was she not?

A. I guess not; I guess she didn't sink.

Q. Are you sure about that, that the Volunteer didn't sink?

A. I am not so sure, but I know about the Star of Hope, because we owned her; that is all.

Q. You know about the Hercules sinking, don't you?

A. Yes, sir.

Q. How about the Julia Williard?

A. Well, I think she was taken care of; I don't think she was allowed to sink.

Q. How long did she stay up there?

A. I think she stayed until the freshet in 1878.

Q. Was not she aground?

A. I can't tell about that.

Q. Now, this was between 1876 and 1880 that these vessels went up there, was it not?

A. Yes, sir.

Q. You say that planing mill is just above the railroad, south of the railroad bridge, don't you?

A. It is on the Fields farm, yes, sir.

112 Q. How far is the planing mill from this railroad bridge
A. Well, as much as eighty rods.
Q. How far is it from the river?
A. About eighty rods.
Q. How far south would you say on a parallel line with thi bridge?
A. Not more than 200 feet.

By Mr. BURTON:

Q. What was the condition of the marine business in the yea 1873 and until 1880 at Ashtabula and elsewhere?
A. Times were pretty good up until 1873, and then they droppe off, and up until 1880 the marine business was very poor; it com menced to pick up a little in 1880.

The plaintiff, further to maintain the issue on his part, calle H. P. HEPBURN as a witness, who being sworn, testified as follows

By Mr. BURTON:

Q. Mr. Hepburn, what is your present residence and occupa tion?
A. My residence is in this city; civil engineer.
Q. I will ask you to state if you have lived at Ashtabula.
A. Yes, sir.
Q. At about what time?
A. I lived there in 1871 and the fall of 1878.
Q. Do you know what was called the spile bridge across the Ash tabula river, used for the Jamestown branch?
A. Yes, sir.
Q. What did you have to do, if anything, with the construction of that bridge?
A. I designed the bridge part and put in the small drawbridge what is called a jack-knife. I was the engineer in charge of the work.
Q. I will ask you to state if you are familiar with the water there and the approaches to that bridge.
A. Yes, sir.
Q. State the facts as to the practicability of putting a draw in that location?

113 To which question the defendant objected; the court over ruled the objection; to which ruling of the court the defend ant excepted.

A. I considered it feasible to put in a draw there.
Q. What can you say as to the foundation for a draw there, Mr Hepburn?
A. There is no trouble about putting in a foundation.
Q. How would that compare with other localities along in north ern Ohio in which streams run under bridges?

Objected to. Objection sustained.

Q. What was the depth of the water there in 1871, or whenever it was when the bridge was built?

Objected to. Objection sustained.

And thereupon the plaintiff rested.

The defendant, to maintain the issue on its part, called H. G. TAYLOR as a witness, who being sworn, testified as follows:

By Judge DICKEY:

Q. Have you at any time during the present year made soundings of the river at Ashtabula?

A. Yes, sir.

Q. At what time did you make those soundings?

A. The latter part of March.

Q. Do you remember the date now?

A. Well, made them several days.

Q. Give us the dates if you can?

A. March 20th to the 23d.

Q. Have you enough familiarity with the river to know what its condition was as to being about the ordinary stage of water, or higher than usual?

A. About the ordinary stage.

Q. I will ask you whether the map I put in your hands correctly shows the curves and bends of the river, the breadth of
114 the river and the depth of the river, as marked there?

A. Yes, sir, it does at those places.

Q. Were those soundings taken at regular distances, as they purport to be?

A. Yes, sir.

Q. And I understand you to say they are all correctly set forth on the map?

A. Yes, sir.

Q. What is the most shallow place, or the least depth below the bridge at any place you found there?

Objected to.

The COURT: He may use the map to refresh his recollection, or may use his notes.

A. It would be anywhere from 3.4 feet to 3.5 feet. That is the least depth.

Q. Now, what is the next least depth at a crossing below the bridge—of the least greatest depth?

A. It would be 4.5 feet to 5.5 feet.

Q. How far is that from the other point?

A. Well, that sounding would take you out forty feet from the bank; the other sounding would take you out from that side about 120 feet.

Q. How far is the least depth you have given from the bridge—below the bridge?

A. That is north of the bridge, you mean?

Q. North of the bridge; yes, sir.
A. About seventy feet, I should say, below the bridge.
Q. How far now is the next least greatest depth below the bridge
A. It would be about 100 feet below the bridge.
Q. Did you take the measurement under the bridge, the greate depth under the bridge?
A. Here is one ten feet (indicating).
Q. Did you not measure the height of the bridge from the water
A. Yes, sir.
Q. What is the height of the bridge from the water?
A. It would be about thirteen feet, as well as I remembe
115 Q. What is the breadth of the river where it is spanne by the bridge?
A. About 200 feet.
Q. Is that directly across or diagonally across?
A. That is at right angles to the base.
Q. What would you say was the width of the river there diag nally across the river?
A. 200 feet at that point (indicating); of course, the river vari in width.
Q. What is the greatest depth of the river at the first measur ment shown by your map on the line above the bridge—south the bridge?
A. Six and five-tenths feet.
Q. Now, at the next line as shown by that map above the brid still further south, what is the greatest depth?

By Mr. BURTON:

Q. These lines are 100 feet apart are they?
A. Yes, sir.

By the COURT:

Q. You mean the soundings are 100 feet apart?
A. The base-line soundings are every ten feet apart, the soun ings themselves.

By Mr. BURTON:

Q. As I understand it, ten feet apart across the river?
A. Yes, sir.
Q. The cross-lines are a hundred feet apart, and on the cros lines you took the soundings every ten feet?
A. Yes, sir.

By Judge DICKEY:

Q. What is the greatest depth at the second line shown by t map?
A. Five and five-tenths feet.
Q. Now, what is the greatest depth at the third line; t
116 third sounding above?
A. Eight and six-tenths feet.
Q. What is the greatest depth at the fourth?

A. Seven and six-tenths feet.
Q. At the fifth?
A. Seven and six-tenths.
Q. At the sixth?
A. Six and three-tenths.
Q. At the seventh?
A. Seven and nine-tenths feet is the deepest point.
Q. At the eighth?
A. Five and two-tenths feet.
Q. At the ninth?
A. Four and six-tenths feet.
Q. At the tenth?
A. Eight and six-tenths feet at one place.

By the COURT:

Q. How far south from the bridge is that tenth sounding?
A. Supposed to be a thousand feet on an angling line.

By Judge DICKEY:

Q. At the eleventh?
A. Seven and two-tenths feet.
Q. At the twelfth?
A. Seven and one-tenth feet.
Q. At the thirteenth?
A. Four and seven-tenths feet.
Q. At the fourteenth?
A. Nine and four-tenths feet; that is close in at the bank.
Q. At the fifteenth?
A. Four and six-tenths feet.
Q. At the sixteenth?
A. Two and six-tenths feet.
Q. At the seventeenth?
A. Two and six-tenths feet.
Q. At the eighteenth?
A. Two and seven-tenths feet.
Q. At the nineteenth?
A. Two and eight-tenths feet.
Q. At the twentieth?
A. Two and seven-tenths feet.
Q. At the twenty-first?
A. Three feet.
Q. At the twenty-second?
A. Three and two-tenths feet.
Q. At the twenty-third?
A. One and six-tenths feet.
Q. Do you get to the riffle there?
A. No, sir, not yet.
Q. A- the twenty-fourth?
A. Four and nine-tenths feet and five and eight-tenths feet.
117 Q. At the twenty-fifth?
A. Four and seven-tenths feet.

Q. At the twenty-sixth?
A. Four and five-tenths feet is the deepest.
Q. At the twenty-seventh?
A. Two and three-tenths feet.
Q. At the twenty-eighth?
A. That is where those riffles are.
Q. The riffle commences at the twenty-eighth?
A. Yes, sir; at that point.
Q. Did you get the depth of the river at twenty-eight?
A. Yes, sir.
Q. What is it?
A. Three-tenths, two-tenths, one-tenth feet.
Q. What do you mean by "two-tenths"?
A. No feet and two-tenths; no feet and one-tenth; no feet and three-tenths.
Q. In making those soundings you may state on each cross-section there how many soundings you made.
A. One every ten feet.
Q. You sounded at every ten feet?
A. Yes, sir.
Q. Is the depth correctly set forth there at each ten feet?
A. Yes, sir.
Q. And that applies to all the soundings and all the cross-sections shown on the map there?
A. Yes, sir.
Q. Now, going below or north of the bridge; the first two soundings you have given us there?
A. Yes, sir.
Q. Now, give me the greatest depth on the third sounding, north of the bridge.
A. Twelve and one-tenth feet.
Q. The fourth sounding north of the bridge?
A. Twelve and eight-tenths feet.
Q. The fifth sounding north of the bridge?
A. Eight feet.
Q. The sixth sounding north of the bridge?
A. Five and eight-tenths feet.
Q. The seventh sounding north of the bridge?
A. Five and six-tenths feet.
Q. The eighth sounding north of the bridge?
A. Nine and seven-tenths feet.
Q. The ninth sounding north of the bridge?
A. Thirteen and two-tenths feet.
118 Q. The tenth sounding north of the bridge?
A. That is as far as it goes.
Q. And I understand you to say that the shore marks there of the river on that map show correctly the bends of the river and its deflections of course?
A. Yes, sir.
Q. And the breadth of the river is shown correctly there at these different places where you made soundings?
A. At each hundred feet; yes, sir.

Cross-examination by Mr. BURTON:

Q. You say this was about the ordinary depth of water when you took those measurements?
A. Yes, sir.
Q. How long have you been acquainted with that river?
A. I have been there for about two years.
Q. Not more than two years?
A. No, sir.
Q. In what capacity have you been there?
A. Been there as assistant engineer and rodman.
Q. Stationed at Ashtabula?
A. Yes, sir.
Q. In what part of Ashtabula do you live?
A. About half way uptown.
Q. Away from the river?
A. Yes, sir.
Q. How frequently at the river?
A. Every day.
Q. Down at the harbor on the main line?
A. At the harbor stationed on the main line.
Q. When did you go there?
A. Two years ago; I think I went there in March.
Q. 1891?
A. Yes, sir.
Q. Before that you knew nothing of the river?
A. No, sir.
Q. You have there some letters; what are we to understand by these letters on this map, "to reduce soundings to main-line datum + 2.14; to reduce soundings to harbor datum + 1.24;" what does that mean?

A. The 2.14 is to be added to the soundings to get them
119 to the main-line datum; and to reduce these soundings to the harbor datum you have to add 1.24.

Q. This refers to what group of measurements?
A. Any of them.
Q. Why, then, is there a different one up here (indicating)?
A. That is a different stage of the water at the time it was taken, you see.
Q. Then, these 2.14 and 1.24 refer to soundings immediately south of the bridge?
A. Yes, sir.
Q. From A to S inclusive, as laid down?
A. Yes, sir.
Q. The 1.64 main-line datum and 0.70 refers to soundings north of the bridge?
A. Yes, sir.
Q. How about this other group south of the bridge?
A. These come here (indicating).
Q. That is the same as those immediately south of the bridge?
A. Yes, sir.

Q. What do you understand by harbor datum; is that a water gauge?

A. Yes, sir; it is the water gauge of the Government established there.

Q. What does that mean, the ordinary level?

A. That is the lowest water since 1848, or in 1848, I think that is the date, and it is the low-water mark.

Q. Then to get to that low-water mark, do I understand you have to add these 2.14 and 1.24 to what you have given?

A. Yes, sir.

Q. To the measurements you have given?

A. Yes, sir; to reduce that to datum.

Q. What is the difference between the main-line datum and the harbor datum?

A. I don't know what the main line get their datum from.

Q. The main line of the Lake Shore road?

A. Yes, sir, the datum is used for running track levels, and to put in grades, and we have to have some data to start from, and that is the main-line datum. This harbor datum we use there on the docks in getting the dock grades and grades around the harbor there.

120 Q. Is that the ordinary level or low water there, what you call main-line datum?

A. That has nothing to do with the water.

Q. What does it have to do with?

A. It is simply a starting point to run from.

Q. That is, the main-line datum does not have anything to do with the water?

A. No, sir.

Q. It is only a base line that you fix, according to which you make your grades and locate your tracks?

A. Yes, sir.

Q. But this harbor datum does have to do with the level of the water?

A. Yes, sir, we set our water grades by that, show how the water is.

Q. The main-line datum is a sort of arbitrary level fixed by the engineers of the Lake Shore road, while the harbor datum is according to a given water measurement?

A. Yes, sir.

By the COURT:

Q. That is the low-water datum, one fixed by the Government in 1848?

A. That is the one at the harbor; that is what we call the harbor datum.

Q. That is the low water in 1848?

A. I think that is the year, sir.

Q. Those measurements were taken at low water?

A. Not necessarily; taken when we went there. This shows the elevation of the water at the time these soundings were taken.

Q. These figures you gave us, were they with reference to the height of the water at that time, or with reference to the harbor datum?

A. Well, that you can do. The soundings plus these will give the harbor datum.

Q. The question is this: You said the depth of the water was so much at a certain place; was that the actual amount at that time or was that with reference to some datum?

121 A. That was the actual water at that time.

Q. How did the depth of the water at that time compare with the harbor datum?

A. It is given right here; 1.24 is added to that; add that to the depth of the water to reduce it to the harbor datum; to get the main-line datum you add 2.14.

Q. Do we understand that the water at the time you measured it was lower than the lowest depth of the water in 1848?

A. Oh, no, sir, the water was that much above datum at that date.

Q. Then you would not want to add to the water, you want to subtract to get the harbor datum?

A. No, sir.

By Mr. BURTON:

Q. How do you get at that?

A. You take the soundings and you put them right in there, then you go to the water gauge and get the gauge of the water at that time.

Q. Exactly; how did that compare at that time with the harbor datum?

A. Well, sir, you plus 1.24.

Q. You mean by that for the depth of the water to equal harbor datum you would plus 1.24?

A. Yes, sir; here at this other time it was + 0.70; so you can see what the water was there.

By the COURT:

Q. Let us see if we understand that; then the harbor datum was 1.24 lower than the depth of the water which you found at that time, is that so?

A. Well, when we took these soundings the water at the harbor was 1.24 higher than zero mark; then when we took these here (indicating) the water was only 0.70 higher; so that would show a little lower water when these were taken.

122 By Mr. BURTON:

Q. Then it is not plus those quantities given there, but minus; why do you say there, "To reduce soundings to harbor datum + 1.24"?

A. You see, these were all taken in regard to datum. The water at that time was 1.24 above datum, so that is added to your sums.

Q. Then in order to get the harbor datum you add this 1.24 to these soundings you have given?

A. Yes, sir.

By the COURT:

Q. When you made the soundings, did you get the soundings according to harbor datum, or did you take the natural depth of the water as you found it?

A. We took the soundings according to the natural depth of the water, and then got the stage of the water from the water gauge. We added that to our soundings which reduced that to datum.

Q. Then if you found five feet to be the actual measurement, you would add to that five feet 1.24 to get its harbor datum?

A. Yes, sir.

Q. That would give you 6.24 feet of depth of water you found?

A. Yes, sir.

Q. So that then the water must have been 1.24 less than harbor datum, was it not?

A. The water the day these soundings were taken was 1.24 above datum—above the zero Government gauge.

Q. As we understand you the greatest depth that you have given at each of these cross-sections is the actual depth of feet and inches of water that was there at the time when you made the measurements?

A. That is right.

By Mr. BURTON:

Q. Did I understand you to say that to get it to harbor
123 datum, it was necessary to add 1.24 to those measurements you have there?

A. Yes, sir, that is, to get it to datum—to bring it to datum.

Q. So if it is five feet there, according to your actual measurement, in order to get that harbor datum, you must add 1.24?

A. Yes, sir, that brings it to datum.

Q. Why is that so, if that harbor datum is less or on a lower level than the actual measurement at that time? I cannot understand that.

A. That is just the stage of the water, sir.

Q. If the stage of the water is below the stage at the time you took this measurement, why should you not deduct rather than add?

A. That would not be getting it to datum, sir.

Q. Now, let us illustrate it by a diagram. Suppose, for instance, that is your base line (indicating), and that is your harbor datum, as you call it. That is the low-water mark in 1848?

A. Yes, sir.

Q. The actual depth of the water is 1.24 above that at the time you took the measurement?

A. No, sir; there is the water gauge. Now, we took the sounding, the actual sounding, five feet, and the water-gauge we had was

1.24, and you see the water is low, so that to reduce that to datum you add 1.24, which would reduce it to harbor datum.

Q. This would take your measurement up to the level of the water gauge fixed in 1848?

A. Oh, yes, that is what we have to start from there.

Q. If you put the pole down in such a place as that it would be 6.24?

A. Yes, that is if we come up to that line; the actual sounding was five feet.

Q. All these soundings are taken with reference to that level there?

A. Yes, sir, taken with reference to the harbor datum.

By the COURT:

124 Q. What do you mean by this water gauge you speak of?

A. It is the harbor datum established by the Government, I think, in the year 1848.

By Mr. BURTON:

Q. The water on the day you measured was below that level 1.24?

A. That is why we add.

Q. So that the minimum level was 1.24 below?

A. At the time these soundings here were taken (indicating), you see it has changed; it would be 0.70.

Q. But the actual level when you measured was 1.24 below the lowest mark in 1848?

A. Yes, sir.

Q. And you have given it there according to actual measurement?

A. Yes, sir, these are the actual measurements.

Q. Of the water in the river at that time?

A. Yes, sir.

Q. Do we understand that the low level there is lower than the depth in 1848?

A. It shows so; yes, sir.

Q. Have you taken measurements at any other times?

A. Yes, sir; I did all the sounding for that bridge there.

Q. The bridge that is below where the docks are?

A. Yes, sir.

Q. When those soundings were taken, was the depth there below the minimum depth?

A. Yes, sir; as a general thing they were having low water there.

Q. What is the nearest point of the docks to the spile bridge?

A. 1,034 feet.

Q. You never have taken, except on this occasion, measurements above the docks?

A. No, sir.

Q. What is the construction of the bridge there?

A. It is a pile bridge.

Q. Was there not a bar above the bridge, that is, upstream?
A. Yes, sir; it shows here.
Q. Is it not clear from the situation there that that bar is caused by those piles there in the bridge?
125 A. That I could not say.
Q. How many rows are there of piles through the stream?
A. That I don't know.
Q. Have you observed the structure of the bridge at any time?
A. Not carefully; no, sir.
Q. Is it not true a large amount of refuse matter and of earth also that gathers around those piles in that bridge there?
A. I have not noticed it; I have not given it a thought.
Q. What do you say the depth was at the bridge?
A. Under the bridge?
Q. Under the bridge, what do you say it was?
A. Ten feet, I think, sir, that was the greatest depth.
Q. A hundred feet below what is it—that is, north?
A. Six and five-tenths, seven and nine-tenths, eight and nine-tenths, eight and eight-tenths.
Q. What is the highest 200 feet below?
A. Twelve and one-tenth.
Q. Why should there be that increase in a hundred feet there, between 100 feet below, or north of the bridge and 200 feet. There is a difference, is there not, of three and three-tenths in depth?
A. Yes, sir, that is right. That would be just at one particular place.
Q. Is there anything in the breadth of the river to cause that condition?
A. No, sir, it don't seem as though there was.
Q. Where do you say that bar is marked on the plat here?
A. It is about at F. At D, E and F there is a bar above the bridge, that is, south of the bridge; in brief, it is at those places marked "O." Those measurements will show a bar.
Q. Where is Fisherman's point on this map?
A. I am not familiar with that.
Q. Did you ever go above the bridge to make soundings until this time in March?
A. Yes, sir, I went once with Mr. Coe.
126 Q. When was that?
A. That was about a year ago.
Q. Did you make any soundings then?
A. Yes, sir.
Q. Have you any minutes of those soundings?
A. I have none.
Q. Where is the wash bank, as it is called, on that map?
A. I should say it was right in here (indicating) where the bank comes around from V to A.
Q. What is the distance of the wash bank above the bridge, the nearest point?
A. About 1,800 feet, in that neighborhood.
Q. From the bridge to the wash bank?

A. Yes, sir.
Q. How far does that so-called wash bank extend?
A. Well, I should say it extends from about 200 feet along there.
Q. What is it?
A. It is a slate bank.
Q. Does it go up somewhat near a perpendicular?
A. Yes, sir.
Q. On which side of the river?
A. On the east side, sir.
Q. You say you don't know where Fisherman's point was?
A. No, sir, I do not know it by that name.
Q. Is there a point here on the west side about 625 feet above the bridge?
A. I don't know of any prominent point.
Q. You have no projection marked there, about by the letter I.
A. I don't know but what you might call that Fisherman's point; I am not familiar with it.
Q. There the river is 200 feet wide?
A. Yes, sir.
Q. How did you get these measurements across the river?
A. With a steel wire, sir, stationed off in ten-feet spaces.
Q. How many of you were engaged in making those soundings?
A. Four or five.
Q. How many were there, three, four or five?
A. About five, I should say.
Q. Don't you know the exact number?
A. I had three men with me all the while. When doing
127 work like this I generally get two men with a boat to help me.
Q. What was the number this time?
A. I cannot remember exactly how many men I had that day; I think there were five there. I can tell by looking at the time-roll.
Q. What kind of a boat did you have?
A. We had a flatboat, sometimes. Then sometimes we did it on the ice. We did some of this on the ice; could not get on with a boat.
Q. And you stretched a wire, with checks every ten feet, across?
A. Yes, sir.
Q. And you made your cross-measurements by that?
A. Yes, sir.
Q. How did you take the measurements as to the depth?
A. With a rod that was divided off into feet and tenths.
Q. Did you put that down yourself?
A. Yes, sir.
Q. Who took the record of the measurements?
A. The record of the measurements—I did it myself.
Q. You put the rod down and took the record of the measurements?
A. Yes, sir.
Q. In some places you cut the ice?

A. Yes, sir.

Q. Over what part of those measurements did you cut the ice?

A. I think we cut from the pile bridge to about this point (the letter S).

Q. What is the fact as to the comparative depth of the water, when there is ice there and when there is not?

A. I don't see that there would be any difference. There would be just as much water when there is ice there as there were when there is not.

Q. In making your measurement did you measure from the lower point of the ice?

A. From the level of the water, sir.

Q. That is below the ice?

A. When you cut a hole in the ice the water will come up to its own level.

Q. Over the hole?

A. Yes, sir.

128 Q. About how thick was the ice when you made the measurements?

A. Very thin, sir.

Q. About how thick?

A. It could not have been half an inch or an inch, anyway; not more than that.

Q. Was there a man by the name of Henry Harpst with you?

A. Harpst was a rodman.

Q. Did he not take a good share of these measurements—these soundings?

A. Yes, sir.

Q. So you have not taken all of those yourself?

A. You mean, did I do the rodding here?

Q. Yes, sir.

A. Oh, no, sir, I took the notes.

Q. He put down the rod?

A. Oh, yes.

Q. So you heard it from him?

A. He took the sounding and sang out to me what it was.

Q. And you put it down?

A. I put it down.

Q. Is that all you know about it?

A. That is all I did.

Q. Did you put down the rod in any of these places?

A. No, I did not do any of the soundings.

Q. You have been on the bridge there frequently?

A. Yes, sir.

Q. Don't you know there are a number of abandoned piles there that do not support the bridge?

A. I know there are some columns of piles there.

Q. That have been just sawed off?

A. I do not know, sir.

Q. They do not support the bridge?

A. What I mean by columns, are piles piled about there to protect the bridge.

Q. How long have those been there?

A. I could not say.

Q. You, of course, never took any measurements before those piles were there?

A. No, sir.

Q. What is your best judgment as to the number of piles there at that bridge?

A. I could not tell you, because I never gave the matter a thought.

Q. There are some hundred, are there not?

A. Indeed, I could not say.

Q. How far apart are those piles?

A. That I could not tell, neither.

129 Q. You have a general judgment about it, have you not?

A. I have not made any measurements around the bridge, and I have not taken particular notice of the bridge. I have always had other work to do, quite busy down in the yard.

Q. Those measurements you took are just below the bridge?

A. Yes, sir.

Q. You went right under the bridge to take some?

A. Yes, sir, right where the line shows.

Q. Don't you know about how many piles there are in there?

A. No, sir, I could not tell you how many were there. I do not know how many bents there are.

Q. About how many?

A. I could not say, because I never noticed carefully enough to remember it.

Q. How far were the rows of piles apart?

A. I could not tell you.

Q. What is your best judgment about it?

A. I have no idea how many piles there are there; never looked at the piles.

Q. How long were you engaged in this work in taking these measurements?

A. I think from about the 20th to the 23rd of March.

Q. Three or four days, which?

A. Probably three.

Q. Engaged all the time each day?

A. Yes, sir.

Q. Did you have anything to do with the making of that map, or one similar to that?

A. I don't know who made this one, I could not say.

Q. That is the point where the bridge crosses there, is it not (pointing to the same point as on the other map)?

A. I never saw this map before.

Q. Do you know who made it?

A. No, sir, I do not.

Q. Do you know as a matter of fact two slips were laid out, one beginning just above and the other just 500 feet below the bridge?

A. I do not know it.

130 Q. You never heard that talk in the engineer's office?

A. No, sir.

Q. You do not know anything about this map or this proposed plan?

A. No, sir, I do not; I think I never saw that map before.

Q. Do you mean to say you never heard of any proposal to lay out slips above the bridge there?

A. No, sir, I never have.

Q. Do you know anything about measurements made by Mr. Hall there in 1891?

A. Who is Mr. Hall?

Q. Mr. Henry Hall, I believe it is. Has that last measurement ever been shown to you?

A. No, sir, I never saw that.

Q. You don't know anything about it?

A. No, sir.

Q. What determines the level of the water at that bridge?

A. How do you mean?

Q. Is there any current there at the spile bridge?

A. I suppose when the water is up; the other day we had pretty a high water there and a very heavy current.

Q. Under ordinary conditions is there any current there?

A. Well, I could not say there is any more than there is anywhere else, sir.

Q. Was there any at all; was there any current there at the bridge?

A. I suppose there must be a certain amount of current; the water coming down the river, it must be moving.

Q. Don't you know as a matter of fact the ordinary stage of the water is determined by the level of the lake, at the spile bridge?

A. It may be, I do not know.

Q. Was there any indication of a current when you took these measurements, until you came up to those riffles?

A. No, sir.

Q. Was there any current?

A. Not very much, if any.

Q. What was the nature of the bottom along here where you took those soundings?

A. Some places mud and some places sand, hard gravel
131 other places. Up around the bank here (indicating), this place we are talking about, there was slate rock.

Q. The wash bank there, as we call it?

A. Yes, sir.

Q. Did you reach any slate until you got to the wash bank?

A. I don't think we did, sir.

Q. Do you know anything as to the thickness of the slate there at the wash bank?

A. No, sir.

Q. Did it extend clear across the river?

A. Pretty well out, sir.

Q. Pretty well out from the easterly side?

A. Yes, sir, a pretty hard bottom.

Q. Where is the deepest water there by the wash bank, on the easterly or the westerly side?

A. It is on the easterly side.

Q. Is that the same kind of formation as the rock on this wash bank coming down?

A. I supposed it was.

Q. You did not pick up any specimen of it to examine?

A. Oh, that is a similar substance. In putting the rod down we could hear it strike.

Q. Since this freshet that has happened recently, have you been there?

A. I have been there at the bridge, sir.

Q. What do you think is the comparative depth of the channel now?

A. I could not say now, because I took no soundings there, not since those were taken.

Q. Above the bridge have you made any soundings in the summer season?

A. No, sir, I have not. You mean above the bridge is up south?

Judge DICKEY: South.

A. No, sir, I never made any soundings there at all.

Q. Is it not a fact the spring freshets have cleaned out the stream and made it materially deeper than it was in the winter when you were there?

A. I could not say that, sir.

132 Redirect examination:

Q. What do you say as to whether or not the water, when you took those measurements, was or was not about the average height that it had been during the two years you had known this stream?

A. The water varies a great deal.

Q. Well, so far as you could see, how was it as to being the ordinary stream during the two years you have known the stream?

A. The water has been in different stages in the two years; sometimes it would be one foot above and sometimes one foot below.

Q. What do you say as to this being about the ordinary or otherwise?

A. There was not any high water or anything of that kind, sir.

Q. Well, you call it more than ordinary low water when you took those measurements?

Objected to.

Q. Was it or was it not more than ordinary low water when you took those measurements?

A. There has been lower water than that.

Q. I want to know whether it was more than ordinary low?

A. I do not think it is more than ordinary low, because we had lower water than 1.24.

Q. What do you say is the distance of the nearest dock to this bridge below?

A. About 1,034 feet to the end of No. 7 dock.

By the COURT:

Q. Did you get to the end of the first dock below the bridge?

A. Yes, sir.

By Judge DICKEY:

Q. On which side of the river is that dock?

A. It is on the east side of the river.

133 Q. About how far does that dock extend down the river?

A. It must be five or six hundred feet, along there, sir.

Q. What comes next to it; is there a dock connected to it below?

A. Yes, sir, I think there is; there is a shorter dock than that but they are not joined.

Q. About what is the space between them?

A. Probably about 200 feet, I should say.

Q. Where there is no dock between those docks?

A. As near as I can remember, it would be about that, yes, sir.

Q. Are there any docks on the opposite side of the river?

A. I think not at that point.

Q. How far below the bridge there to the first dock on the opposite side of the river?

A. I could not say.

Q. Well, approximate it.

A. I don't know, because that is over on the Pennsylvania side; I don't know where their dock fronts in there; I am not familiar with their ground.

The defendant thereupon offered in evidence, map identified by the witness, which is marked "Exhibit A" and hereto attached as a part of this bill of exceptions.

By Mr. BURTON:

Q. It is true there are docks on the Pennsylvania side—you know in a general way about that?

A. I know there are some docks over there.

Q. You have been up and down the river making soundings?

A. Yes, sir.

Q. You would not have the court understand that you do not know generally about the Pennsylvania docks?

A. No, sir, but I do not know their location there. I could not tell you how far below the bridge the Pennsylvania docks

134 commence. I did not have anything to do with them; did not make any measurements about them.

Q. Don't you know it is a fact they begin about fifty feet below the line of the Lake Shore docks?

A. I could not say that, because I don't know.

Q. It is not a thousand feet below the Lake Shore line, is it?

A. Where the docks start?

Q. Yes, sir.
A. I could not tell you, sir.
Q. Do you mean to say that you cannot tell whether the Pennsylvania docks are a thousand feet below the Lake Shore line?
A. The docks on the line of that bridge—is that what you mean?
Q. The Pennsylvania docks come away above that, don't they?
A. Come away above what?
Q. The swing bridge.
A. The Pennsylvania docks come above the bridge?
Q. Yes.
A. Not that I know of; I don't think they do.
Q. Do you mean to say the Pennsylvania docks do not come above the swing bridge?
A. South of the swing bridge?
Q. Yes, sir.
A. No, sir, I don't think they do.
Q. How many feet of docks are there on the Lake Shore side below the bridge?
A. I don't know how many feet there are altogether.
Q. Well, about how many?
A. Well, there is a good many feet of dock there; I could not tell how many feet there are.
Q. This one nearest the bridge is No. 7?
A. That is No. 7 dock, yes, sir.
Q. How many feet long is that?
A. I should say that is about 500 or 600 feet.
Q. Below that is No. 6?
A. Yes, sir.
Q. Bordering on the river?
A. Yes, sir.
Q. How long is that?
A. That would probably be about 200 feet.
Q. Below No. 6 is what?
A. No. 8, I think, is down there.
Q. How long is that?
A. Probably 200 or 300 feet; I could not say exactly.
135 Q. Below No. 8, what is there?
A. No. 8 is the last on that side.
Q. Where is Ellsworth dock?
A. I think that is what they call No. 8.
Q. How long is that dock?
A. About 200 or 300 feet.
Q. How long is No. 5?
A. No. 5, that is up in the slip on the other side, probably 500 or 600 feet.
Q. No. 4, how long is that?
A. That is the Angeline dock.
Q. The Minnesota Iron Company?
A. Yes, sir.
Q. How long is that?

A. Probably 600 or 700 feet.

Q. Then below that is the Pittsburg & Lake Angeline, ain't it?

A. That takes them all in.

Q. There is No. 5, Angeline dock; then there is No. 1, where is No. 1?

A. Right up the bend of the river, the ship-chandler—200 or 300 feet there.

Q. How long is No. 1?

A. Probably 200 or 300 feet.

Q. Now, opposite these docks you named, the Angeline, Minnesota, etc., are there any docks there on the west side, the Pennsylvania side?

A. I do not know whether there are any opposite there or not, because that is what I was speaking about; I don't know how far that dock comes up there; I am not familiar with that stage of the river; I do not know how far that dock comes up there.

Q. I understood you to say you had made soundings in the river there?

A. Yes, sir.

Q. And in that way you saw the docks on both sides?

A. Yes, sir, but we did not do much sounding up there; all the sounding was done in the new work.

Q. Where is the new work?

A. It is on the lake shore in front of the docks.

Q. That is not in the river at all?

A. Yes, sir, it is in a portion of the river.

Q. The water runs into the river, but it is not in the river;
136 there is no question about that?

A. It comes off the river just like the Angeline dock would come off. The Angeline dock comes off just the same way.

Q. That is, the water flows into a kind of slip?

A. Yes, sir.

Q. There is a very large dock there by the river belonging to the Lake Shore on the east side there, near to the river?

A. That is away up in front.

Q. The water leads into that from the river or lake, which?

A. Not from the river.

Q. Well, your taking measurements in that would not give you any idea of the depth of the water would it?

A. No, not unless you would start right at the river.

Q. Digging a hole at the side there would not give you any idea how deep the river was?

A. Just the same as No. 5 dock, that I took the length of.

Q. Measuring No. 5 dock would not give you any idea of the depth of the river, would it?

A. It would, because the river backs up in around there.

Q. The depth of the water depends on how deep the excavation is?

A. That would not give you an idea how deep it was out in the channel.

Q. Your soundings have been taken in these slips in sight of the main line, haven't they?

A. No, sir, these soundings up here (indicating) were taken in the river channel down along No. 7 dock.

Q. Were those you were speak- of shown by the map?

A. Yes, sir.

Q. Most of the soundings in these slips were taken outside of the river?

A. Yes, sir, mostly the soundings were taken out in the east, yes, sir.

Q. You say there was low water last summer?

A. Yes, sir.

Q. You say the minimum depth was 1.5 below the harbor datum, that is the very lowest depth you have ever known?

137 A. I think that is about as low as it has got.

Q. These measurements there on this portion of the river were taken on successive days, were they?

A. Yes, sir.

Q. And there was a difference on those two days?

A. A difference between 1.24 and 0.70.

Q. The river rose that much between the two days?

A. Yes, sir.

Q. And those measurements above the bridge were taken when it was on a lower level, that is immediately above the bridge?

A. Yes, sir.

The defendant, further to maintain the issue on its part, called R. O. ROTE, JR., as a witness, who being sworn, testified as follows:

By Mr. CARR:

Q. Where do you live, Mr. Rote?

A. Cleveland.

Q. What is your business?

A. Draughtsman.

Q. In whose employ?

A. The Lake Shore Railroad Company.

Q. State what, if anything, you had to do within the last twenty-four hours with making measurements of Ashtabula river at the point of this bridge?

A. Well, yesterday I made some measurements at this bridge and located all artificial obstructions in the water-way at that place that I could find.

Q. Did you make that drawing (handing paper to witness)?

A. I did.

Q. Now, tell us what you found as to obstructions, and as to the space between bents?

The COURT: No, not bents; space between those low piles.

138 A. This distance that I took is not exactly between the low piles, but it is the smallest distance between the old piles and the new piles; the distance taken is the smallest vacant space that appears.

Q. Give us those distances.
A. I found one twenty-two feet and four-tenths.
Q. Is that to the east or to the west?
A. That is toward the west or south.
Q. Then it is the first space from the west bent?
A. No; there is two smaller spaces.
Q. How many spaces did you measure there?
A. There are seven.
Q. Well, now, this is the third one from the west?
A. Yes, sir; third one from the west.
Q. Now give us that distance again.
A. Twenty-two feet and four-tenths.
Q. And that is between the piles that you found there?
A. Yes, sir.
Q. Now as to the next one.
A. The next space is thirty-one feet and seven-tenths.
Q. Is that between the piles?
A. That is between the old piles and the new bent, the old piles that are cut off and the bent at present sustaining the bridge.
Q. Are there any piles next to the bent on that side?
A. No, sir.
Q. Then it is that distance in the clear?
A. In the clear.
Q. Now, the next space.
A. The next space is twenty-seven feet and two-tenths.
Q. And that is in the clear I take it?
A. That is in the clear. The next space is nineteen feet and six-tenths. That is in the clear, and the smaller space at the end of four feet and four-tenths.

Cross-examination by Mr. BURTON:

Q. Which end of that did you begin to measure?
A. South end.
Q. On this side of the river?
A. Yes, sir.
Q. Did you measure the water there anywhere?
A. I measured the distance from the lowest part of the bridge to the water.
139 Q. You did not measure the water, the depth of it?
A. No, sir.
Q. Simply measured to the surface of the water?
A. Yes, sir.
Q. What was the condition of the water as to being clear or riley?
A. Well, it was muddy in some places.
Q. How far down could you see?
A. About a foot and a half.
Q. Might there not have been spiles below that that you did not see?
A. There might have been if they were low enough.

Q. You didn't use a hoe or anything to find out whether ther were below there?

A. I did not.

Q. All you examined were those that were visible up to the surface of the water or within a foot and a half below it?

A. Yes, sir.

Q. Now, if there had been a different structure in there, is it not probable that there would have been other piles in midway between each of these bents that you point out?

A. There might have been if there had been a structure there that required them to be placed at those places.

Q. How about these old piles, did they go straight across or regular; did you examine that?

A. They were generally straight but in some places they were irregular.

Q. What is the condition as to the current there; does it go right through at right angles with the bridge or across?

A. Well, I think it is a little at an angle.

Q. It would naturally be that way with any bridge?

A. It would depend upon how it is built.

Q. There is another row of piles there?

A. Yes, sir.

Q. What is the distance from the river up to the bridge there?

A. Ten feet.

Q. Did you measure that carefully?

A. Yes, sir.

Q. What seemed to be the condition as to the water there?

A. I do not understand.

Q. As to being high or low; the stage of the water?

140 A. Well, I don't know; I suppose it depends on certain conditions; I don't know just——

Q. Is it not true that the water there is above the normal height—you don't know that?

A. No, sir.

And thereupon the defendant rested, and the foregoing is all the evidence given or offered by either side upon the trial of the case.

And thereupon came the defendant and requested the court to separately state the conclusions of fact found from the conclusions of law, which findings of the court, both of fact and law are as follows:

That the depth of water in said river at the point where the bridge of the defendant company crosses the same is, at a low stage of water, seven feet deep, and has a depth of at least five feet from that point for a distance of at least eighteen hundred feet above the bridge; that the width of the channel for said eighteen hundred feet is 140 feet. From the said bridge to the lake the water is still deeper, and there is nothing to obstruct the free passage of boats to and from the lake.

And that boats drawing not to exceed five feet of water might, except for the bridge in question, pass to and from Lake Erie to

said point at least eighteen hundred feet above said bridge. That said river from Lake Erie to said point at least eighteen hundred feet above said bridge is in fact a navigable stream. That
141 boats used in navigating Lake Erie, and which come into said river for commercial purposes, draw from four to eighteen feet of water. That a large amount of freight consisting of iron ore, coal, lumber and other articles of commerce, is brought into said river from other ports and delivered at the docks upon said river, and in like manner a large amount of freight is received from said docks by such vessels, for carriage to other ports. That substantially all the lands that can be used for docks below said bridge are owned and used by the defendant and other railroad companies. There is some demand for docks above the bridge in question upon said navigable waters of said river. That it is practicable for the defendant railroad company to use a draw or swing bridge in place of the one that it now maintains there, being the bridge in controversy herein. That as said bridge was built and is still maintained, vessels navigating said river cannot pass above said bridge.

That the said defendant has misused its power and franchises in building and maintaining the bridge in question without a draw by which vessels can pass said bridge, and that it ought to be ousted from the continuance of such bridge without proper draws.

To each of which several findings of fact, and to each of which several conclusions of law, the said defendant then and there excepted.

And thereupon the defendant filed its motion for a new trial
142 of this cause, and that the said findings of fact and conclusions of law be set aside and vacated for the reasons set forth in said motion; which said motion was heard and overruled, to which ruling of the court in overruling said motion the defendant excepted.

And thereupon the court held, decided, ordered, adjudged and decreed as follows, to wit:

That the said defendant company be and it hereby is ousted from the maintaining of said bridge at the location named and from the franchise or privilege of maintaining any bridge at said point not provided with a proper draw; to each of which orders, judgments and decrees the said defendant presented this bill of exceptions, which is allowed, signed, sealed and ordered to be made a part of the record in this cause by filing, but not recording at length.

CHARLES C. BALDWIN, [SEAL.]
HUGH J. CALDWELL, [SEAL.]
Judges of the Circuit Court, Cuyahoga County, Ohio.

July 1st, 1893.

143 STATE OF OHIO, } ss:
Franklin County, }

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the foregoing Exhibit "A" is a true copy of the record filed August 9th, 1893, in the supreme court of Ohio in cause No.

3710, entitled The Lake Shore & Michigan Southern Railway Company *vs.* The State of Ohio on the relation of Russell C. Humphrey, error to the circuit court of Cuyahoga county, Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this twentieth day of July, A. D. 1894.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

Costs of this transcript, $20.00.

144 THE LAKE SHORE AND MICHIGAN SOUTHERN Railway Company, Plaintiff in Error,
against
THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY, Defendant in Error.
} Petition for Writ of Error.

To the Honorable Franklin J. Dickman, chief justice of the supreme court of the State of Ohio:

Your petitioner, The Lake Shore and Michigan Southern Railway Company, a citizen of the United States and of the State of Ohio and having its principal place of business in said State, to your honor respec-fully represents and sets forth that at the January term, A. D. 1893, of the circuit court of Cuyahoga county, in the State of Ohio, and on the 26th day of May, 1893, being a day in the term aforesaid, in a case wherein said State of Ohio *ex rel.* Russell C. Humphrey was plaintiff and the said The Lake Shore and Michigan Southern Railway Company was defendant, a decree and order were rendered by said circuit court in favor of said relator and against your petitioner, ousting your petitioner from the right to maintain its bridge across Ashtabula river at Ashtabula, in said State, and from the franchise or privilege of maintaining any bridge at said point not provided with a proper draw and assessing the costs of said action against your petitioner.

Your petitioner prosecuted error in said cause to the su-
145 preme court of Ohio to reverse said decree and judgment, but the same were affirmed by said court at the January term, 1894.

Your petitioner further represents and states that in the rendition of said decree and judgment by the said circuit court and the said judgment of affirmance by the supreme court it became and was material and necessary to the case to determine whether the subject-matter of said suit had not been wholly taken from the courts of this State and the jurisdiction of the matters involved therein vested exclusively in the Secretary of War of the United States and the Federal courts by the act of Congress passed September 19th, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers

and harbors, and for other purposes," set forth and contained in the supplement to the Revised Statutes of the United States, vol. 1, second edition, 1874–1891, sections 4, 5, 7, and 10, your petitioner claiming and setting forth that the said State courts had no jurisdiction to hear and determine the questions and matters involved in said suit by reason of the provisions of said act of Congress, and that the exercise of such jurisdiction by said State courts was repugnant to the provisions of said law; but said circuit court and said supreme court (the latter being the highest court of law or equity in said State in which a decision can be had in said action) held and determined that the exercise by them of jurisdiction in said action was not repugnant to said act of Congress, and that the courts of said State of Ohio have jurisdiction to hear and determine the questions involved in said suit; all of which plainly
146 appears upon the face of the record of said case in the supreme court, a certified transcript of which record is presented herewith.

Wherefore your petitioner asks leave to have its writ of error in this behalf, to the end that it may be determined by the Supreme Court of the United States whether the action of said courts is not repugnant to the provisions of said act of Congress; and it prays further for a supersedeas, and that the amount of the bond may be fixed by your honor.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By GEO. C. GREENE,
General Counsel for said Company.

Writ of error and supersedeas allowed as prayed for in the aforegoing petition, the plaintiff in error to execute to the defendant in error an undertaking in the sum of one thousand dollars, conditioned according to law, with sufficient surety, and approved by the circuit court of Cuyahoga county, Ohio, or by the clerk thereof.

FRANKLIN J. DICKMAN,
Chief Justice of the Supreme Court of Ohio.

July 7th, 1894.

147 STATE OF OHIO, *City of Columbus.*

Supreme Court of the State of Ohio, of the Term of January, A. D. 1893.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *vs.* THE STATE OF OHIO *ex Rel.* RUSSELL C. HUMPHREY. } No. 3710.

Error to the circuit court of Cuyahoga county.

Date.	Memoranda.
Aug. 9th, 1893.	—Petition in error & waiver of summons filed.
" " "	—Circuit court transcript filed.
" " "	—Original papers and bill of exceptions filed.
" " "	—Printed record filed.
Sept. 29th, "	—Motion by defendant to advance & notice filed.
Oct. 10th, "	—"Ordered by the court that said motion be, and the same is hereby, allowed, and request for oral argument is noted." O. B. 13, page 191.
Dec. 8th, "	—Plaintiff's printed briefs and proof of service filed.
Feb'y 5th, 1894.	—Defendant's printed briefs filed.
" 19, "	—Proof of service of defendant's printed briefs filed.
May 15th, "	—"This cause came on to be heard upon the transcript of the record of the circuit court of Cuyahoga county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $——.
148	Ordered that a special mandate be sent the circuit court of Cuyahoga county to carry this judgment into execution.
	To all of which judgment and order of the court the plaintiff, by its counsel, excepts."

May 22nd, 1894.—"On motion of the plaintiff in error, The Lake Shore & Michigan Southern Railway Company, this court orders it to be certified and made a part of the record in this cause and of the decree heretofore rendered that in the rendition of said decree it became and was necessary and material to the case to determine whether the subject-matter of this suit had not been wholly taken from the courts of this State and the jurisdiction of the matters and things set forth in the petition of the relator filed in this case vested exclusively in the Secretary of War of the United States and the Federal courts by the act of Congress passed September 19th, 1890, entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' set forth and contained in the supplement to the Revised Statutes

of the United States, volume 1, second edition, 1874–1891, sections 4, 5, 7, & 10, the plaintiff in error claiming that the courts of this State had and have no jurisdiction to hear and determine the questions involved herein by reason of the provisions of said act of Congress, and that the exercise of such jurisdiction by this court and the court below was and is repugnant to the provisions of said law; but the said court and this court held and determined that the same were not repugnant to said act of Congress and that the courts of this State have jurisdiction to hear and determine the questions involved herein, and this court holds and decides herein against the said claim so made by the plaintiff in error.

149 And it is further certified that this court is the highest court in this State in which a decision of this case can be had."

May 22nd, 1894.—Mandate issued.
" " —Original papers sent to clerk.

Costs.

Filing petition in error,	$5.00,	paid by	Estep, Dickey, Carr & Goff.
" motion,	2.00,	"	Burton & Dake.
This transcript,	3.00,	"	F. J. Jerome.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 3710, The L. S. & M. S. R'y Co. *vs.* The State of Ohio *ex rel.* Russell C. Humphrey, and that the same are truly taken and correctly copied from the records of said court, to wit, from Order Book No. 13, pages 451 and 459, and Minute Book No. 16, page 127.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this fourteenth day of June, A. D. 1894.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

[Endorsed:] Supreme court of the State of Ohio. No. 3710. The Lake Shore & Michigan Southern Railway Company *vs.* The State of Ohio *ex rel.* Russell C. Humphrey. Transcript. Supreme court of Ohio.

Endorsed on cover: Case No. 15,665. Ohio supreme court. Term No., 781. The Lake Shore & Michigan Southern Railway Company, plaintiff in error, *vs.* The State of Ohio *ex rel.* Russell C. Humphrey. Filed August 13th, 1894.

NOV 5 1896
CLERK

In Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, . *Plaintiff in Error,*

AGAINST

156

THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY, ... *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

GEO. C. GREENE,
Of Counsel for Plaintiff in Error.

of the United States, volume 1, second edition, 1874–1891, sections 4, 5, 7, & 10, the plaintiff in error claiming that the courts of this State had and have no jurisdiction to hear and determine the questions involved herein by reason of the provisions of said act of Congress, and that the exercise of such jurisdiction by this court and the court below was and is repugnant to the provisions of said law; but the said court and this court held and determined that the same were not repugnant to said act of Congress and that the courts of this State have jurisdiction to hear and determine the questions involved herein, and this court holds and decides herein against the said claim so made by the plaintiff in error.

149 And it is further certified that this court is the highest court in this State in which a decision of this case can be had."

May 22nd, 1894.—Mandate issued.
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Costs.

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" motion,	2.00,	"	Burton & Dake.
This transcript,	3.00,	"	F. J. Jerome.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 3740, The L. S. & M. S. R'y Co. *vs.* The State of Ohio *ex rel.* Russell C. Humphrey, and that the same are truly taken and correctly copied from the records of said court, to wit, from Order Book No. 13, pages 454 and 459, and Minute Book No. 16, page 127.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this fourteenth day of June, A. D. 1894.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

[Endorsed:] Supreme court of the State of Ohio. No. 3740. The Lake Shore & Michigan Southern Railway Company *vs.* The State of Ohio *ex rel.* Russell C. Humphrey. Transcript. Supreme court of Ohio.

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In Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, . *Plaintiff in Error,*

AGAINST

156

THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY, ... *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

GEO. C. GREENE,
Of Counsel for Plaintiff in Error.

The water at the bridge is seven feet deep at low stage, and has a depth of five feet for a distance of eighteen hundred feet above the bridge, and from the bridge to the lake the water is deeper, and there is nothing to obstruct the passage of boats to and from the lake.

In May, 1892, the defendant in error filed a petition in *quo warranto*, in the Circuit Court of Cuyahoga County, Ohio, alleging the foregoing facts, and that said bridge was constructed and located without the consent of the Board of Public Works of Ohio and without lawful authority from any source, and that said bridge is a nuisance, a great and irreparable injury to the property located above said bridge, and an unlawful obstruction to a navigable stream located within the State of Ohio.

That in erecting and maintaining the same the plaintiff in error has misused and misuses a franchise conferred upon it by law and claims a right in contravention of law. Wherefore the defendant in error prayed "the advice and judgment of the Court in the premises, and for due process of law against the said defendant, that it may be compelled to answer to the State of Ohio by what right it maintains the said bridge at the location aforesaid, and that said defendant may be ordered by the Court to remove the same, or locate a sufficient draw therein." (Record, pp. 9, 11.)

The plaintiff in error answered said petition, denying that the river was navigable above the bridge, that said bridge was constructed and located without the consent of said Board or without lawful authority, or that it was a nuisance or an unlawful obstruction of a navigable stream, or that the plaintiff in error had misused a franchise conferred on it by law.

The plaintiff in error further answered as follows:

"Second. And this defendant, for a further and second defense to said action, says that this Court has no

jurisdiction over the subject matter of the several matters and things set forth in the plaintiff's petition, and says: That by virtue of the Act of Congress, passed September 19, 1890, set forth in Supplement to the Revised Statutes of the United States, Vol. 1, second edition, 1874–1891, Sections 4, 5 and 7, the sole and exclusive jurisdiction of the matter and things set forth in plaintiff's petition are vested in the Secretary of War of the United States, and that the said Secretary of War has given this defendant no notice of any changes made in regard to the several matters and things set forth in plaintiff's petition. That the Federal Government of the United States having assumed and taken control of the subject matter set forth in said petition, that the same is now a Federal question, of which this Court has no jurisdiction." (Record, p. 14.)

The cause was heard in May, 1893, and the Court found the following facts (Record, pp. 103, 104):

"That the depth of water in said river at the point where the bridge of the defendant company crosses the same is, at a low stage of water, seven feet deep, and has a depth of at least five feet from that point for a distance of at least eighteen hundred feet above the bridge; that the width of the channel for said eighteen hundred feet is one hundred and forty feet. From the said bridge to the lake the water is still deeper, and there is nothing to obstruct the free passage of boats to and from the lake. And that boats drawing not to exceed five feet of water might, except for the bridge in question, pass to and from Lake Erie to said point at least eighteen hundred feet above said bridge. That said river from Lake Erie to said point, at least eighteen hundred feet above said bridge, is in fact a navigable stream. That boats used in navigating Lake Erie, and which come into said river for commercial purposes,

draw from four to eighteen feet of water. That a large amount of freight, consisting of iron ore, coal, lumber, and other articles of commerce, is brought into said river from other ports and delivered at the docks upon said river, and in like manner a large amount of freight is received from said docks by such vessels, for carriage to other ports. That substantially all the lands that can be used for docks below said bridge are owned and used by the defendant and other railroad companies. There is some demand for docks above the bridge in question upon said navigable waters of said river. That it is practicable for the defendant railroad company to use a draw or swing bridge in place of the one that it now maintains there, being the bridge in controversy herein. That as said bridge was built and is still maintained, vessels navigating said river cannot pass above said bridge."

As conclusions of law the Court found as follows (Record, 104):

"That the said defendant has misused its powers and franchises in building and maintaining the bridge in question without a draw by which vessels can pass said bridge, and that it ought to be ousted from the continuance of said bridge without proper draws."

And the Court adjudged: "That the said defendant company be, and it is hereby, ousted from the maintaining of said bridge at the location named, and from the franchise or privilege of maintaining any bridge at said point not provided with a proper draw." (Record, 104.)

The Supreme Court of the State of Ohio, in May, 1894, in proceedings in error, affirmed the judgment of the Circuit Court and certified and made part of the record and decree the following (Record, 107):

"That in the rendition of said decree it became and was necessary and material to the case to determine

whether the subject matter of this suit had not been wholly taken from the courts of this State and the jurisdiction of the matters and things set forth in the petition of the relator filed in this case vested exclusively in the Secretary of War of the United Stated and the Federal Courts by the Act of Congress passed September 19th, 1890, entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' set forth and contained in the Supplement to the Revised Statutes of the United States, Vol. 1, second edition, 1874–1891, Sections 4, 5, 7 and 10, the plaintiff in error claiming that the courts of this State had and have no jurisdiction to hear and determine the questions involved herein by reason of the provisions of said Act of Congress, and that the exercise of such jurisdiction by this Court and the Court below was and is repugnant to the provisions of said law; but the said Court and this Court held and determined that the same were not repugnant to said Act of Congress and that the Courts of this State have jurisdiction to hear and determine the questions involved herein, and this Court holds and decides herein against the said claim so made by the plaintiff in error. And it is further certified that this Court is the highest Court in this State in which a decision of this case can be had."

Errors Assigned upon the Record.

The errors assigned appear at page 2 of the Record, and are as follows:

"1. The subject matter of said suit had been and was wholly taken and removed from the jurisdiction of the Courts of the State of Ohio and vested in the Secretary of War of the United States, and the Courts of the

United States, by the Act of Congress passed September 19, 1890, set forth in Supplement to the Revised Statutes of the United States, Vol. 1, second edition, 1874–1891, Sections 4, 5, 7 and 10.

"2. The Courts of the State of Ohio had no jurisdiction to hear, try or determine the matters involved in said action, or to make or render the order, judgment or decree above mentioned.

"3. Said Supreme Court of Ohio erred in holding and determining that the Courts of said State had and have jurisdiction to hear and determine the questions involved in said suit, and in holding and determining that the exercise of such jurisdiction by said court was not repugnant to the provisions of the above-mentioned Act of Congress.

"4. The Ashtabula River, at the place where it is crossed by the bridge in question, is navigable water of the United States, and the power conferred by the Constitution upon Congress to regulate commerce comprehends the control of said river and navigable waters for that purpose and to the extent necessary, and is paramount and free from interference by the States, and the attempt in this case on the part of the State by and through its Courts to regulate and control the bridging over or use of such navigable waters of the United States, was and is in excess of the power of the State and an unlawful interference in a matter which is exclusively committed to and within the jurisdiction of Congress and the Federal authorities.

"5. The order, judgment and decree aforesaid of said Supreme Court of Ohio was and is erroneous, contrary to and without authority of law, in violation and contravention of the Constitution of the United States and of the Act of Congress aforesaid."

The plaintiff in error, in support of its contention that said judgment is erroneous, respectfully submits the following:

BRIEF.

I.

The Courts of the State of Ohio had no jurisdiction over the subject matter of the suit, and their action, judgment and decree was an unlawful attempt to regulate commerce and an interference in a matter which is exclusively committed to Congress and the Federal authorities, and upon which Congress had acted.

The power and jurisdiction of the State to regulate or exercise control over the navigable waters of the United States, situated within the State, is permissive only, and entirely ceased when Congress acted.

The Ashtabula River at the bridge is a navigable water-way of the United States.

By the Act of September 19, 1890 (Chapter 907, Section 4, Vol. 1, Supplement to Revised Statutes, second edition), Congress assumed the regulation and control of all obstructions by bridges to navigation of navigable water-ways of the United States, and provided means whereby they could be removed through action of the Secretary of War, United States District Attorneys, and United States Courts.

The fourth and fifth sections of that Act read as follows:

"Sec. 4. That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable water-ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steam-boats, or other water-craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

"Sec. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and re-enacted so as to read as follows:

"That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association

shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

In *Gilman vs. Philadelphia*, 3 *Wall.*, 713, it was held that the power of Congress to regulate commerce comprehends the control for that purpose and to the extent necessary of all the navigable waters of the United States which are accessible from another State than that in which they lie.

The Court said, "Congress may interpose, whenever it shall be deemed necessary, *by general* or special laws. *It may regulate all bridges over navigable waters, remove offending bridges*, and punish those who shall thereafter erect them. *Within the sphere of their authority both the legislative and judicial power of the nation are supreme.*" * * * "*Until* the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the State it plenary."

It is insisted that Congress, by the Act above referred to, has awakened and made effective the dormant power of the Constitution, and that under that Act both the legislative and judicial power of the nation are supreme and exclusive.

In *Pennsylvania vs. Wheeling, etc., Bridge Co.*, 18 *How.* 421, as stated in *South Carolina vs. Georgia*, 93 *U. S.* 4, "it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation."

In *Newport & Cincinnati Bridge Company vs. United States*, 105 *U. S.* 470, it is said: "The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States."

In *Miller vs. Mayor of New York*, 109 *U. S.* 385, it is said that Congress "having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of navigable waters between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive."

In *Cardwell vs. American River Bridge Company*, 113 *U. S.* 205, it is said: "When Congress acts directly with reference to the bridges authorized by the State, its will must control, so far as may be necessary to secure the free navigation of the streams," and that "the States may provide for their regulation and management until Congress intervenes and supersedes their action."

In *Escanaba, etc., Transportation Company vs. Chicago*, 107 *U. S.* 678, it is said that where the subjects upon which the commercial power of Congress "may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management *until Congress interferes and supersedes it.*"

Congress, by the Act of 1890, interfered and superseded the State authority, and assumed control of obstructions to navigable water-ways of the United States, and provided ways and means for determining whether

obstructions existed, and for compelling their removal if found to exist.

Congress assumed the regulation of the subject matter of obstruction of water-ways by bridges, and provided the method and means by which any abuses might be corrected through action of United States officers and Courts. Thereupon the power of the States over the subject matter ceased.

Unless this be true, we may have a conflict between State and Federal authorities, and although the Secretary of War and Federal authorities, under the Act of 1890, may decide and hold that a bridge is not an unreasonable obstruction to free navigation, yet the State authorities may hold and decide otherwise, declare the bridge a nuisance and require its removal.

There may be bridges, without draws, across navigable streams, and the United States authorities may determine and hold that they are proper structures, and that commerce between the States is thereby benefited, and that the dangers and delays to traffic and commerce by rail incident to draw-bridges, outweigh the injury to traffic and commerce by the waterway caused by the fixed bridge.

Such determination by the Federal authorities should be final and conclusive, but if the State Courts have the power and authority sought to be exercised in this case, they, and not the Federal authorities, are paramount and supreme.

II.

The Act of 1890, above referred to, is not unconstitutional.

In the Court below the counsel for defendant in error claimed that the fourth and fifth sections of the Act were

unconstitutional, upon the ground that they delegate to th Secretary of War powers exclusively delegated to Con gress, and the opinions of Judge Sage in *U. S. vs. Rider* 50 *Fed.*, 406, and of Judge Shiras in *U. S. vs. Keokuk etc., Bridge Co.*, 45 *Fed. R.*, 178, were cited in support o that contention.

The Keokuk case arose under the Act of Congress o August 11th, 1888, which differed from the Act of 1890 amendatory of the Act of 1888, and which was intended to obviate the objections relied upon in the Keokuk case by giving the Secretary power to act only when the bridge constituted (1) an *unreasonable* obstruction to navigation, and (2) requiring him to give opportunity to parties to be heard, and (3) to specify the changes re quired to be made.

At the close of his opinion, Judge Shiras, after refer ring to the amendatory Act of 1890, says:

"As the present case was brought before the passage of the amendatory statute, it is not necessary to consider or determine whether the amended statute is or is not open to the same objection that is held fatal to the validity of the first statute." (Pp. 187–8.)

In *U. S. vs. Rider*, Judge Sage, without discussing the effect of the amendments of 1890, concurring in the conclusions set forth by Shiras, J., in the Keokuk case, holds the Act unconstitutional.

It is respectfully submitted that Congress may, in the exercise of the power to regulate commerce, vest the Secretary of War, the Interstate Commerce Commission, or other officer or body, with power such as is here vested in the Secretary.

In *McWhorter vs. Pensacola, etc., R. R. Co.*, 24 *Fla.*, 417, it was held that a statute delegating power to a railroad commission to fix just and reasonable rates for

freight and passenger tariffs to be observed by railroad companies, was not unconstitutional as being a delegation of legislative power.

In *Miller vs. Mayor*, 109 *U. S.*, 385, the Court, referring to the frequent delegation of power of Congress to heads of departments, and the right so to do, says:

"The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the Act shall take effect may be left to such agencies as it may designate" (Citing *S. C. vs. Ga.*, 93 *U. S.*, 13.)

In *Milnor vs. New Jersey R. R. Co.*, decided January 27, 1862, in this Court, not reported except in Book 16, U. S. S. C. Reports, L. Ed., Appendix, page 799, etc., it was held that whether a bridge was a lawful structure or not was a legislative and not a judicial matter (page 804).

Congress has power to legalize a bridge over a navigable river, although in the absence of such authority the bridge would be a nuisance, and Congress may authorize the Secretary of War to ascertain the facts as to whether the bridge is a lawful structure, and by so doing it does not abdicate any of its authority.

Miller vs. Mayor, 109 *U. S.*, 385.
Pennsylvania vs. Wheeling and Belmont Bridge Co., 59 *U. S.*, 421.
Gray vs. Chicago, etc., R. R. Co., 77 *U. S.*, 454.
Wisconsin vs. Duluth, et al., 96 *U. S.*, 379.

It could not have been intended that Congress must take specific action in each case, but that it may by

general enactment or law, as by the Act of 1890, provide a general scheme for the regulation of navigable waters, and for the regulation or prevention of obstructions to navigation or commerce.

III.

The judgment of the Supreme Court of Ohio should be reversed.

GEO. C. GREENE,

Of Counsel for Plaintiff in Error.

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165-365

Office Supreme Court, U. S.
FILED.
JAN 2 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 156.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

AGAINST

THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

T. E. BURTON,
Counsel for Defendant in Error.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 156.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO, *ex rel.* RUSSELL C. HUMPHREY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

The courts of the State of Ohio have decided that a bridge across Ashtabula River, in that State, erected and maintained by plaintiff in error, and located about one mile from the point where the river empties into Lake Erie, is an obstruction to navigation, and that the bridge should be removed, or be furnished with a suitable draw. The Supreme Court of Ohio, affirming the decision of a lower court, rendered a decree to that effect.

The case comes to this Court upon a writ of error.

In its original form this bridge was less objectionable than now, because provided with a draw.

It is not claimed by the plaintiff in error that any permission for the structure has ever been granted, either by State or National authority. But it is contended that by the fourth and fifth sections of the River and Harbor Act of 1890, which are quoted in the brief of opposing counsel, the Secretary of War has exclusive jurisdiction over bridges across navigable streams, and that no action in the premises, either permissive or preventive, can be taken by State authorities. The question, then, is exclusively one of jurisdiction.

At the very outset it will be noticed that, according to the claim of the plaintiff in error, this is not a question between State and Federal courts, or in fact a question between courts at all. It is maintained that jurisdiction does not belong to the State courts in any event, or to the Federal courts, except to execute the commands of the Secretary of War, an executive officer of the Government.

It is certainly not less than surprising if Congress has passed an act by the terms of which the residents of any State of this Union, when a navigable body of water is obstructed by a bridge, must be without remedy, unless the Secretary of War shall choose to act. Many of these obstructions, as well as the streams themselves, would be of merely local importance; yet, if the contention of the plaintiff in error is correct, all must wait upon the action of one individual.

This Court has repeatedly recognized the desirability of leaving to the States, save in exceptionable instances, the regulation of bridges over local streams, because it is a subject which can be more carefully attended to by local authorities. On this subject the remarks with reference

to bridges over the Chicago River, in the city of Chicago, in Escanaba Company *vs.* Chicago (107 U. S., 678, 683), are particularly in point.

It has been at all times conceded that until Congress acts respecting navigable streams, entirely within a State, the State has plenary power. See Gilman *vs.* Philadelphia (3 Wallace, 713); Wilson *vs.* Blackbird Creek Company (2 Peters, 245), and numerous other cases. It is not too much to say that the Federal authorities have exercised the right to control navigable streams, located entirely within a State, with caution.

In Cardwell *vs.* Bridge Company (113 U. S., 210), Justice Field says:

"The commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations, affecting alike all the States."

And on this subject in County of Mobile *vs.* Kimball (102 U. S., 691), the court say:

"The uniformity of commercial regulations, which the grant to Congress was designated to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject, or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for where that acts, the State authority is superseded."

The above is quoted in 107 U. S., 687, and in addition the court say: "Bridges over navigable streams, which

are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity."

While it is true that laws have been passed governing a particular class of bridges, such as those to be constructed across a particular river, the tendency has been to limit this jurisdiction very carefully, and there are numerous expressions in the reports of this Honorable Court which come very near to establishing the rule that so important an authority as that for the location of a bridge is not to be exercised without a specific act for each case. On this subject Justice Bradley, in Willamette Bridge Company *vs.* Hatch (125 U. S., 1, 8), said: "There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States."

Also, in 107 U. S., 690, the court say: "To render the action of the State invalid in constructing or authorizing the constructing of bridges over one of its navigable streams, the General Government must directly interfere so as to supersede its authority and annul what it has done in the matter." It should be noticed, also, that the power of the General Government has been more frequently invoked in removing obstructions than in authorizing bridges.

See Cardwell *vs.* American Bridge Co., 113 U. S., 205.

It is clearly evident that this statute referred to was not intended to be so broad as to sustain the claim of

the plaintiff in error, or to give to an executive officer of the Goverment authority to decide in all cases whether bridges are obstructions or not. An examination of the statute will, it is submitted, lead to the conclusion that it was only intended to provide a concurrent or cumulative remedy for the prompt removal of obstructions in navigable streams, and that, perhaps, only where all questions as to navigability have been settled. It was by no means intended to establish a general system for the determination of the question as to when and where bridges are to be allowed. If it aims to go farther, it is clearly unconstitutional.

The form of the statute does not lead us to think that it was intended to provide a new rule concerning authority for bridges. It makes no affirmative provision for the construction of new ones. It invites no one to go to the Secretary of War either to obtain leave to build in the first instance, or to gain the right to retain that which now exists. The implication is that in the future, as heretofore, individuals and corporations, who desire Federal authority, must apply to Congress.

If the contention of the plaintiff in error is correct, and the only way to remove this bridge is by application to the Secretary of War, we can hardly exaggerate the changes made, or attempted to be made, by this law. The power to prevent a State from removing obstructions in navigable waters necessarily includes the power to consent to the construction or location of such obstructions. Undoubtedly, if the way suggested is the only way to remove the structure, full jurisdiction as to navigable rivers is given to an executive officer of the Government.

It is submitted that this is not the reason or purpose of the statute.

No general regulation can meet the requirements of the case, because in the great variety of situations arising and the number of structures required, uniformity is impossible, and special regulations or statutes are needed in many instances. In proof that the scope of the act is not so broad as maintained, reference is made to the section in another portion of the statute in which provision is made to punish offenders who deposit refuse of various kinds in navigable streams. It certainly would not be claimed that this provision was more then a concurrent remedy; otherwise, a populous city could not secure purity of water courses, in its locality, without appealing to the Secretary of War.

However limited an application may be conceded to this statute, it is a question whether it is not unconstitutional, in any event. It has been so held in all the cases brought to my attention in which it has been fully considered. Only in one, that of the Oregon Transportation Company *vs.* Columbia Street Bridge (53 Fed. Rep., 549), its validity was taken for granted, but the decision was against the party claiming under it, upon another ground.

In U. S. *vs.* Keokuk and H. Bridge Company (45 Fed. Rep., 178), it was decided to be unconstitutional, on the ground that it delegated to the Secretary of War powers vested in Congress. Judge Shiras says, page 183:

"The section in question confers upon the Secretary of War the duty of determining whether a given bridge is an unreasonable obstruction, which in turn involves the duty of determining how much of an obstruction the

public interests require should be placed in the way of the free navigation of the river in question, which is a question which belongs to Congress to determine, and which can not be rightfully delegated to any subordinate authority or person."

In United States *vs.* Rider (50 Fed. Rep., 406), a similar decision was rendered. In both decisions the changes made by the act of 1890 were considered, and it is clear that the different phraseology of the later act would make no difference. The reason for this decision is perfectly clear. If the act assumes to grant a general jurisdiction to the Secretary of War to determine what are obstructions to navigable streams, when bridges should be removed, and when they should be retained, it is clearly an interference with the proper boundaries between legislative and executive authority. Congress can not delegate this authority to a cabinet officer.

On this general subject Mr. Cooley says (Const. Lim., 137): "The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, can not relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved." Decisions have gone to the extent of holding that the legislative body can make a law delegating the power to determine whether conditions expressed in the law have been complied with, or the power to determine some fact or state of things, upon which the law makes or intends to make its own action depend.

See—Miller *vs.* Mayor, etc., 109 U. S., 385;
Field *vs.* Clark, 143 U. S., 649, 693.

I submit that no decision has gone so far as to authorize Congress to abdicate its most important duties. The

principle applies with exceptional force in the present controversy. The right to determine whether bridges across navigable streams can be constructed is one of the most important duties of Congress. It can not by a sweeping general provision give this tremendous power to an executive officer of the Government. It will be noticed that in this country there is no absolute rule as to what rivers are to be regarded as navigable. The test of the ebb and flow of the tide is not applicable to our conditions and has never been adopted here. The decision by the State courts of this question has been regarded as largely a question of fact. To Congress the graver responsibility belongs of determining the relative hardships which should, on the one hand, be suffered by those interested in navigation, who desire to keep the channels entirely unimpeded; or, on the other hand, by those interested in land transportation, who desire to erect structures across navigable waters. This is a great question of National policy. There can be no invariable rule applicable to all localities. There is no guide but the interests of the people, and the question should be decided by the deliberate judgment of Congress.

The courts of Ohio had jurisdiction and the judgment of the Supreme Court of that State should be affirmed.

T. E. Burton,
Counsel for the Defendant in Error.

165-365

Office Supreme Court, U. S.
JAN 13 1897

In Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY,
Defendant in Error.

October Term, 1896.
No. 156.

REPLY TO DEFENDANT'S BRIEF.

In the brief filed on behalf of the defendant in error my contention is inaccurately stated. I do not contend that the Secretary of War has exclusive jurisdiction over bridges across navigable streams, but I do contend that Congress having acted, and by the Act of 1890 having assumed to regulate and control the erection or maintenance of bridges across navigable waters of the United States, and to provide means and methods whereby obstructions to commerce and navigation may be prevented or removed, the power and authority of the States over the subject matter ceased. Nor do I contend "that jurisdiction does not belong to the Federal Courts except to execute the commands of the Secretary of War," but I do contend that since the Act of 1890 "jurisdiction does not belong to the State Courts."

Nor does it follow from anything which I claim that "Congress has passed an Act by the terms of which the

residents of any State of this Union must be without remedy unless the Secretary of War shall choose to act."

Whether this Court has, as is claimed, or has not, "repeatedly recognized the desirability of leaving, save in exceptional instances, to the States the regulation of bridges over local streams" is not material here. The question of "desirability" or policy is by the Constitution committed not to the Courts, but to Congress, and its decision is not reviewable by any other department.

Nothing is said by the Court in *Escanaba Company vs. Chicago* which conflicts with my position upon this question.

In that case the Court recognized the power of the States "to regulate, within their limits, matters of internal police," and the power of the State over bridges across navigable streams "until Congress acts on the subject." It did not recognize but denied the power of the State to regulate, control or manage after Congress had interfered and superseded the State's authority, and the Court recognized the right of Congress to so interfere and supersede, and held that "The power vested in the general Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connections with other waters they form a continuous channel for commerce among the States or with foreign countries."

The Ashtabula River, at the place where the bridge is located, is such a water-way of the United States. It is not a "local stream," but is part of a continuous channel for commerce among the States.

I do not question that until Congress acts the State has plenary power, but I contend that when Congress

acted in 1890 the power of the State ceased in respect to the bridge in question.

I do not agree with counsel "that authority for the location of a bridge is not to be exercised without a specific act in each case," nor that the expressions of this Court come near establishing that rule.

The language quoted from the opinion of Mr. Justice Bradley, in Willamette Bridge Company case, does not sustain that contention, but only that there must be a "direct statute," not a "specific statute in each case." In that case the Court said: "We do not doubt that Congress, if it saw fit, could thus assume the care of said streams (*i. e.*, establish the police power of the United States over the rivers of Oregon, or give to the Federal Courts the right to hear and determine according to Federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers), in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not been done by the clause in question."

Instead of sustaining the contention of my learned friend, I respectfully submit that the opinion of Mr. Justice Bradley seems to me to be decidedly adverse to it.

My learned friend contends that the Statute of 1890 "was only intended to provide a concurrent or cumulative remedy for the prompt removal of obstructions in navigable streams, and that perhaps only when all questions as to navigability had been settled."

I find nothing in the statute requiring or making the action or determination of the Secretary of War dependent upon or concurrent with action of the State authorities. On the contrary, it provides for separate independent action by the Secretary, in no manner saving or reserving any right or power to the States. He also contends that the statute was not "intended to provide

a new rule concerning authority for bridges. It makes no affirmative provision for construction of new ones."

I find, however, that the seventh section of the Act does provide a new rule concerning authority for bridges, and makes affirmative provision for construction of new ones. It prohibits the construction of new bridges until location and plan shall have been submitted to and approved by the Secretary of War.

The tenth section also prohibits the creation of any obstruction not affirmatively authorized by law, and declares that "the continuance of any such obstruction, *except bridges*, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense," etc.

This I submit, taken in connection with section 4, in effect recognizes existing bridges as lawful structures only to be declared otherwise by the Federal authorities in the manner provided in the Act.

It being impracticable to apply to Congress in each and every case, Congress saw fit by this Act to provide a method of proceeding whereby Federal control and regulation could be exercised when necessary for the protection of commerce or to prevent obstruction.

It is for Congress to provide for determination of questions as to what is or is not in the interest of commerce. A bridge that prevents navigation of a stream may afford facilities for commerce far exceeding those destroyed or obstructed by it and still not be an unreasonable obstruction; and although the interests of the State might be subserved by navigation of the stream, the State cannot control as against Congressional action.

The claim that extraordinary and arbitrary power is conferred upon the Secretary cannot be maintained. His power to act is limited to cases where the obstruction is "unreasonable," and after giving the parties interested

"reasonable" opportunity to be heard, he may give notice to them to make such alteration as to render navigation "reasonably free, easy and unobstructed."

Should he attempt to compel unreasonable alterations, the Federal Courts could afford relief or decline to impose the penalty imposed by the fifth section which provides for failure to comply with the "lawful order" of the Secretary. His unreasonable requirement would not be a lawful order.

That Congress may employ any appropriate means to carry into effect the powers given to it, is well established by the decisions of this Court, and it is unnecessary to refer at length to them. I will, however, call attention to a recent decision. In *Interstate Commerce Commission vs. Brimson*, 153 *U. S.* 447, it was held, "Congress may, in its discretion, employ any appropriate means, not forbidden by the Constitution, to carry into effect and accomplish the objects of a power given to it by the Constitution."

The Court, at pages 472-3, quotes and approves the language of the Court in *McCulloch vs. Maryland*, 17 *U. S.* 316: "The sound construction of the Constitution must allow the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Again, "When the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree

of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

I submit that the means provided and to be employed under the Act of 1890, are appropriate means, and not forbidden by the Constitution, to carry into effect and accomplish the objects of the power given to Congress by the Constitution, and that they are plainly adapted to that end, and consistent with the letter and spirit of the Constitution.

GEO. C. GREENE,

Of Counsel for Plaintiff in Error.

165-365

In Supreme Court

OF THE UNITED STATES.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY,
Defendant in Error.

October Term, 1896. No. 156.

In Error to the Supreme Court

OF THE STATE OF OHIO.

GEO. C. GREENE,
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The W. M. Bayne Printing Co., Cleveland, O.

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I submit that the means provided and to be employed under the Act of 1890, are appropriate means, and not forbidden by the Constitution, to carry into effect and accomplish the objects of the power given to Congress by the Constitution, and that they are plainly adapted to that end, and consistent with the letter and spirit of the Constitution.

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THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *Plaintiff in Error*	**October Term, 1896. No. 156.**
vs.	
THE STATE OF OHIO, EX REL. RUSSELL C. HUMPHREY, *Defendant in Error.*	In Error to the Supreme Court of the State of Ohio:

PETITION FOR REHEARING:

To the Honorable the Justices of the Supreme Court of the United States:

The Lake Shore and Michigan Southern Railway Company, Plaintiff in Error, respectfully asks for a rehearing herein, and submits the following reasons why its petition should be granted.

As stated in the opinion of the Court, I "deny the jurisdiction of the State of Ohio or its Courts to control the subject matter of the controversy," but not "on the theory that the determination of whether the Defendant possessed the right to *erect*

the bridge and to continue it is a Federal and not a State question." Whether the Defendant possessed the right to erect the bridge is, I claim, not material, it was an *existing bridge* at the time the Act of 1890 was passed, and whatever the power of the State may have been before that time over the right of Defendant to continue it, its power ceased when Congress by that Act assumed the power and right to determine whether any existing bridge was an unreasonable obstruction and to require removal.

The opinion delivered in this case by the Court seems to concede that there is by the act a "delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce."

I contend that the power to direct a change was not confined to "lawful structures," but extends to all existing bridges, and that if the Act is not unconstitutional, its effect is to supersede the authority of the States to require removal of obstructions to navigation caused by bridges over navigable waters of the United States. To that extent Congress has by the Act of 1890, acted and assumed control.

My contention is, I respectfully submit, too broadly stated in the opinion. I do not contend that the Act of 1890 "substantially amounts to an express assumption by Congress of entire control

over all and every navigable stream," but only that thereby Congress assumed control of the question whether "any railroad or other bridge now constructed" is an unreasonable obstruction to navigation. The bridge in question in this case was constructed before the Act was passed, and if it was an unreasonable obstruction the remedy and means for its removal were provided by the Act.

The decision seems to be placed upon the ground that the Act of 1890 does not "confer upon that officer (the Secretary of War) power to give original authority *to build* bridges."

It is said "The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built."

I do not contend that the delegation of power to direct a change should be construed as conferring the right to determine when and where a bridge may be built. My contention is that the power of Congress to determine whether existing bridges are obstructions to navigation, was exercised by the Act of 1890, and that Act provided the means whereby obstructions could be removed, and that Congress having acted and assumed control of the matter of such obstructions and provided a

code of procedure and a tribunal to pass upon the question whether obstruction existed, and was unreasonable, the power of the State in that behalf ceased. The question as to "the right to determine when and where a bridge may be built" is not involved.

The Act of 1890, I insist, provides for two things, independent of each other:

First, The removal of obstructions to navigation caused by existing bridges and the procedure by which such removals may be effected.

Second, Regulations governing the location, plans, etc., of bridges to be hereafter built.

In the opinion it is said "The mere delegation to the Secretary of the right to determine whether a structure *authorized by law* has been so built as to impede commerce, and to direct when reasonably necessary its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end." I have not contended that the Act confers upon the Secretary "the power to give original authority to build bridges;" but my contention is that the Act confers upon the Secretary the power to determine whether "any railroad or other bridge now constructed" is an unreasonable obstruction to free

navigation and to require alterations so as to remove obstructions.

The power of the Secretary under the Act is not limited to "a structure authorized by law," but extends to "any railroad or other bridge now constructed."

I respectfully submit that my contention is not that the effect of the act is that Congress has "confirmed and made valid every bridge built without sanction of law," but that it has vested in the Secretary the power to inquire and determine whether "bridges now constructed" are unlawful, i. e., unreasonably obstruct navigation, and to remedy the evil if found to exist. This proposition is entirely independent of the question as to his power in the matter of the construction or location of new bridges. Congress having assumed to regulate and provided this remedy in case of obstructions caused by "any railroad or other bridge now constructed," the power of the state in the matter of regulating and providing remedies for such obstructions ceased, and the state Court had no power to render the judgment it did requiring the removal of an alleged obstruction.

Again it is said: "The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named

the right to determine when and where a bridge *may be built.*"

I do not question the soundness of this proposition, nor is it necessary that I should to sustain my contention.

I do not contend that the Act confers "on the officer named the right to determine when and where a bridge may be built," but only that the fourth section gives him authority to act and determine whether "railroad and other bridges now constructed" are unreasonable obstructions to navigation. This authority is given in express terms.

The language of the seventh section is not in conflict with my position. *That section relates solely to bridges hereafter to be constructed* and imposes certain restrictions and delegates certain powers to the Secretary. The fourth section, under which I claim *relates solely to "railroad and other bridges now constructed."*

The qualification referred to in the opinion which applies to section seven is limited in its application to that section and relates only to bridges thereafter to be constructed, and does not extend to the fourth section, or relate to existing bridges.

The construction of the statute claimed by me is not that its purpose was to deprive the states of all power as to every stream, but only that to the

extent that Congress had acted, and regulated and provided remedies, has the power of the states been superseded and ceased.

In support of my construction of the Act and its effect upon the powers of the State upon navigable waters wholly within the state, I beg to refer to the case of City of Chicago vs. Law et al, decided by the Supreme Court of Illinois and reported in 144 Illinois Rep. p. 569. It that case it was held that "When Congress has taken no action on the subject, the City, under the grant of legislative power, will have the right to make such improvement in a navivable river within its limits in aid of navigation as in its judgment may be required; but after Congress has passed an act on the subject, and has thus assumed jurisdiction over the subject, the City can only act in conformity to the Act of Congress.

"So when the Act of Congress has declared it unlawful for the City of Chicago to make any improvement of the Chicago River until the plan of its work is submitted to and approved by the Secretary of War, the City will have no power to improve that river, except by procuring the approval of the Secretary of War."

For the reasons herein above stated, the Lake Shore and Michigan Southern Railway Company